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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM APRIL 12, 1909, TO NOVEMBER 12, 1909.

OFFICIAL REPORT.

VOLUME 39.

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ERRATA.

On page 157, in paragraph 3 of syllabus, line 2, read "at the point of discovery," for "at a point of discovery."

On page 560, in paragraph 8 of syllabus, line 5, read "in the court's instructions,—was sufficient," for "in the court's instructions,—was insufficient."

(III)



JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH, THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
---	---	----------------------------

OFFICERS OF THE COURT:

ALBERT J. GALEN, Attorney General.

W. H. POORMAN, First Asst. Attorney General.

EDGAR M. HALL, Second Asst. Attorney General.

WILLIAM L. MURPHY, Third Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

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Admitted from October 5, 1909, to February 7, 1910.

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ARNEST, G. C., December 6, 1909.
BALTON, L. C., October 28, 1909.
BEAULIEU, L. V., February 7, 1910.
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COLEMAN, HENRY J., October 28, 1909.
COMER, CLYDE E., December 15, 1909.
CONWELL, EDWARD P., October 29, 1909.
CUFFE, JOHN, December 14, 1909.
DILLE, CHESTER B., January 18, 1910.
EWALD, FRED. A., January 17, 1910.
FISHER, LOUIS A., October 7, 1909.
FURMAN, FRED. J., December 13, 1909.
GALLUP, CHARLES E., January 17, 1910.
GREENE, MERLE C., October 25, 1909.
GRIFFIN, JOSEPH H., November 8, 1909.
HASELTON, G. IRVING, October 6, 1909.
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MORGAN, FRANKLIN B., December 13, 1909.
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PEASE, HARLOW F., December 6, 1909.
PIGOTT, JOHN T., December 14, 1909.
ROBERTS, FRANK A., December 20, 1909.
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SCHMIDT, GROVER C., December 18, 1909.
SELB, JOHN T., October 25, 1909.
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STANGER, ASA O., November 8, 1909.
STEPHENSON, ROY S., December 6, 1909.
STONG, ROBERT C., December 3, 1909.
SWANK, WALTER R., November 10, 1909.
THOMPSON, T. A., October 5, 1909.
THORNE, WALTER W., December 6, 1909.
TIGHE, W. J., October 6, 1909.
WRATHER, L. G., October 14, 1909.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1910.

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District Judges: Hon. James M. Clements; Hon. J. Miller Smith.

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County of Silver Bow. County Seat, Butte.

District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon. J. B. McClellan.

Officers: County Attorney, Thomas J. Walker, Esq.; Clerk of District Court, John J. Foley; Sheriff, John K. O'Rourke.

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Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

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County Attorney, W. H. Trippet, Esq.; Clerk of District Court, Barney Hogan; Sheriff, James O'Keefe.

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Officers of Granite County (County Seat, Philipsburg)—
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Officers of Ravalli County (County Seat, Hamilton)—County
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C. Baker; Sheriff, Wm. Ward.

Officers of Sanders County (County Seat, Thompson Falls)—
County Attorney, H. C. Schultz; Clerk of District Court, W. E.
Nippert; Sheriff, Clyde E. Baker.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Llewellyn L. Callaway; Hon. Joseph
B. Poindexter.

Officers of Beaverhead County (County Seat, Dillon)—
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Court, F. A. Hazelbaker; Sheriff, O. C. Gossman.

Officers of Jefferson County (County Seat, Boulder)—
County Attorney, D. M. Kelley, Esq.; Clerk of District Court,
Wm. T. Sweet; Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City)—
County Attorney, Julian A. Knight, Esq.; Clerk of District
Court, Matt. Carey; Sheriff, N. J. Trauffer.

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Counties of Park and Sweet Grass.

District Judge: Hon. Frank Henry.

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Attorney, O. M. Harvey, Esq.; Clerk of District Court, Arthur
Davis; Sheriff, H. McCue.

Officers of Sweet Grass County (County Seat, Big Timber)
—County Attorney, J. T. Vaughan, Esq.; Clerk of District
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Counties of Custer and Dawson.

District Judge: Hon. Sydney Sanner.

Officers of Custer County (County Seat, Miles City)—County Attorney, S. Walker, Esq.; Clerk of District Court, James G. Ramsey; Sheriff, H. R. Wells.

Officers of Dawson County (County Seat, Glendive)—County Attorney, F. P. Leeper, Esq.; Clerk of District Court, Harry A. Sample; Sheriff, A. Larson.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade and Teton.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls)—County Attorney, J. W. Speer, Esq.; Clerk of District Court, Geo. Harper; Sheriff, John A. Collins.

Officers of Teton County (County Seat, Chouteau)—County Attorney, P. I. Cole, Esq.; Clerk of District Court, S. McDonald; Sheriff, K. McKenzie.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.

District Judge: Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, Ben. B. Law, Esq.; Clerk of District Court, J. A. Johnston; Sheriff, A. H. Sales.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, W. T. Deadmond.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

District Judge: Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—County Attorney, John C. Huntoon, Esq.; Clerk of District Court, J. B. Ritch; Sheriff, Ed. Martin.

Officers of Meagher County (County Seat, White Sulphur Springs)—County Attorney, W. L. Ford, Esq.; Clerk of District Court, F. H. Mayn; Sheriff, Geo. L. Williams.

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Counties of Flathead and Lincoln.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—County Attorney, J. H. Stevens, Esq.; Clerk of District Court, Sam. D. McNeely; Sheriff, W. H. O'Connell.

Officers of Lincoln County (County Seat, Libby)—County Attorney, B. F. Maiden, Esq.; Clerk of District Court, P. R. Long; Sheriff, M. A. Shannahan.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—County Attorney, F. A. Carnal, Esq.; Clerk of District Court, C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—County Attorney, Thos. Dignan, Esq.; Clerk of District Court, C. C. Beede; Sheriff, S. C. Small.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Rosebud and Yellowstone.

District Judge: Hon. Sydney Fox.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, A. C. Spencer, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, Geo. A. Horkan, Esq.; Clerk of District Court, D. J. Muri; Sheriff, R. J. Guy.

Officers of Yellowstone County (County Seat, Billings)—
County Attorney, H. L. Wilson, Esq.; Clerk of District Court,
*Lorin T. Jones; Sheriff, John C. Orrick.

*The Supreme Court, in *Carwile v. Jones*, 38 Mont. 590, having decided that the election for clerk of the district court had resulted in a tie vote, the board of county commissioners on July 7, 1909, appointed Lorin T. Jones to serve as clerk until the next general election. On *quo warranto*, held that Jones was properly appointed. (See *State ex rel. Jones v. Foster*, *post*, p. 583.)

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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, in force from and after January 4, 1909, see 37 Mont., page **xxiii.**

AMENDMENT OF THE RULES OF THE SUPREME COURT.

It is ordered that Rule XXII of the Rules of this court, relative to the admission of attorneys from other jurisdictions, be amended so as to read as follows:

Application, How Made.—Candidates for admission under this section may make application in open court at any time. Application must be made upon motion of the attorney general or one of his assistants, and upon the verified petition of the applicant, showing the facts recited in section 6385, Revised Codes, 1907, etc. (Promulgated October 5, 1909.)



CASES DETERMINED
IN THE
SUPREME COURT

AT THE
MARCH TERM, 1909.

The HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,

THE HON. WILLIAM L. HOLLOWAY,

} **Associate Justices.**

WILHITE, RESPONDENT, v. BILLINGS & EASTERN MONTANA POWER CO., APPELLANT.

(No. 2,673.)

(Submitted April 5, 1909. Decided April 12, 1909.)

[101 Pac. 168.]

Nuisances—Power Dams—Comparative Damages—Notice—Injunction—Scope of Order—Evidence—Sufficiency.

Power Dams—Nuisances—Injunction—Findings—Evidence—Sufficiency.

1. In a suit for a mandatory injunction to compel defendant power company to lower its dam so as to avoid flooding plaintiff's lands lying above it, and for damages, *held*, that the findings of the court in favor of plaintiff were not based upon a "mathematical impossibility," but were supported by substantial testimony and, therefore, ought not to be disturbed on appeal.

Same—Offer of Proof—Exclusion—Harmless Error.

2. Alleged error in excluding defendant company's offered proof that the plaintiff's lands had not netted to him in any one year the sum of \$801 was harmless, where he had not claimed any damages on account of impairment of the rental value of his premises, and where the finding of the jury that such value had been decreased by the construction and maintenance of the dam, if pertinent, was probably only material to the question whether the injunction

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(1)

should issue, and where the damages which were awarded (\$200) could all be attributed to specific losses testified to by plaintiff.

Same—Injunction—Notice Before Suit.

3. Defendant power company was chargeable with knowledge of whatever conditions resulted from the construction and maintenance of its dam, and could, therefore, not complain of the failure of plaintiff to give it notice that he had been injured by the overflowing waters and submit an itemized statement of his damages, before commencing suit.

Same—Injunction—Comparative Damages—Evidence.

4. The record not disclosing any evidence that defendant company was a public service corporation or that it was actually operating any part of its plant, but showing that the dam was in course of construction for over twenty years, and that numerous mistakes had been made and difficulties encountered during its erection, defendant's offer to prove that it cost \$120,000 to build was properly excluded, since, under these circumstances, the magnitude of defendant's interest was not apparent, so as to make applicable the rule that injunction will not issue in view of the great damage that would result to defendant and others dependent upon its operations, and the comparatively small injury caused to plaintiff by the maintenance of the dam.

Same—Not Nuisance *Per Se*.

5. The finding of the court that the dam in question was a nuisance *per se*, disapproved.

Same—Injunction—Scope of Order.

6. Where the evidence did not show that it was necessary to rebuild, repair or remove defendant power company's dam in order to prevent the flooding of plaintiff's lands, an order of the court to that effect was too broad. All plaintiff was entitled to was a decree that defendant abate the nuisance and refrain from causing him injury in the future, and that, to attain this result, it employ the necessary and requisite means.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by F. Wilhite against the Billings & Eastern Montana Power Company. From a decree for plaintiff and an order denying defendant a new trial, the company appeals. Remanded, with directions to modify.

Messrs. Maury & Templeman, and Mr. W. M. Johnston, for Appellant.

Where the business carried on is a lawful business, such as lighting, or furnishing a domestic water supply in convenient form to a city of twelve thousand or fifteen thousand people, then, before the court shall issue its mandatory injunction demolishing the industry, it is its duty to weigh and balance

the respective inconveniences and losses of each party, and, if any other order as to the manner of conducting the business will remedy an inconvenience, make such other order. (*Atchison v. Peterson*, 87 U. S. 507, 22 L. Ed. 414; *Story's Equity Jurisprudence*, sec. 959b.)

The verdict is based on what the books term a mathematical impossibility. Such verdicts cannot stand even in law cases, though supported by what seems to be evidence. (Moore on Facts, sec. 153; *Nelson v. Big Blackfoot Milling Co.*, 17 Mont. 553, 44 Pac. 81.) The plaintiff in his complaint says that the detriment will always last as long as the dam is left there. That gives him a perfect right to avoid a multiplicity of suits. He may bring one suit for the entire damage to his land, by reason of this permanent structure being a nuisance permanent in its character. That the owner of adjacent land may bring one action for the whole damages, see *Watson v. Colusa Parrot*, 31 Mont. 517, 79 Pac. 14; *Chicago F. & B. Co. v. Sanche*, 35 Ill. App. 174. Where it is sought to enjoin a business lawful in its nature, the chancellor, instead of striking with his iron hand and eradicating it, should use his God-given intelligence to try and find out what method, if any, will enable the business to run without injury to anyone. (*McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795; *Daughtry v. Warren*, 85 N. C. 136; *Müller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.)

Mr. Fred H. Hathhorn, Mr. Harry A. Groves, and Mr. M. Brown, for Respondent.

The injury complained of is a nuisance *per se*. It cannot be claimed that the plaintiff cannot maintain his action for a mandatory injunction unless he can show substantial damages. (See *Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80, 79 Pac. 371, 68 L. R. A. 223; *Tröe v. Larson*, 84 Iowa, 649, 35 Am. St. Rep. 336, 51 N. W. 179; *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814; 2 Farnham on Waters, sec. 582; *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416; 2 Wood on Nuisances, sec. 784.) If plaintiff will lose irre-

parably the right of property concerning which he brings suit, it is sufficient to entitle him to relief. (22 Cyc. 763, note 25; *Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is an action begun in Yellowstone county to compel the defendant to "lower, remove, or alter its dam in such a manner as to avoid" causing injury to plaintiff, and for damages sustained by the plaintiff "up to date." The complaint alleges that the plaintiff is, and for seven years has been, in possession of certain agricultural lands bordering on the Yellowstone river; that he has made application for leave to file upon said premises under the homestead laws of the United States, which application remains undetermined; that the hydro-electric plant of the defendant company is situated on the river below plaintiff's land; that a dam has been constructed across the river at a point about one-half mile below plaintiff's premises, which dam has been purchased, and is maintained at a height of ten feet, by the defendant; that during the months of June and July, 1908, the dam caused the river to overflow a portion of plaintiff's land and deposit dirt, sand, and sediment thereon, and caused the water to remain stagnant thereon "and to seep into his cellar and chicken-house"; that the stagnant water became foul, and caused the air to become impure and unhealthy; that, on account thereof, plaintiff became unwell, and his family were compelled to remove from their home and live elsewhere for a month; that, on account of the overflow, "it is now almost impossible for plaintiff to reach the river and water his livestock or to obtain water for household purposes," and it is now impossible for plaintiff to reach a certain spring on the premises to obtain water therefrom for any purpose; that the water overflowing the land destroyed four tons of hay and partially damaged a garden of about one-half acre, all to plaintiff's damage in the sum of \$2,500. Plaintiff further alleges that previous to the completion of the dam, in November or December, 1907, he suffered no injuries of the nature complained of in

1908, and that, "if the defendant so maintains said dam, it will cause the waters of the Yellowstone river to overflow and remain upon the premises of plaintiff during the months of June and July of each succeeding year, and thus cause the plaintiff similar injury to crops, inconvenience, discomfort and annoyance as it has this year, and during the winter months said dam will cause the ice formed in said river to gorge in such a manner as to make it difficult to obtain water from the river, * * * and will cause said spring * * * to be completely covered with ice." The answer is substantially a denial of all, save the formal, allegations of the complaint.

The cause was tried before the court and a jury. A general verdict for \$200 damages was found in favor of the plaintiff. and the jury also found specially (1) that plaintiff's premises were overflowed as alleged; (2) that the overflow was caused by defendant's dam; (3) that there is a reasonable probability that the overflow will so continue in future by reason of the defendant maintaining its dam; (4) that plaintiff suffered annoyance, inconvenience and damage therefrom; (5) that the spring has not been damaged by ice gorges; (6) that sediment and dirt have been deposited in the channels between plaintiff's tillable land and the main channel of the Yellowstone river on plaintiff's land; that said deposits were caused by the dam, and have caused plaintiff annoyance, inconvenience and damage; (7) that there is a reasonable probability that the conditions complained of will continue; (8) that the construction and maintenance of the dam was the proximate cause of the high water in June and July, 1908, and the consequent damage to plaintiff; (9) that the ranch is less valuable on account thereof and the rental value has been decreased thereby. The court adopted the findings of the jury and made two others in addition thereto: (1) That, if the defendant maintains its dam as the same is now being maintained, the plaintiff will suffer irreparable injury; and (2) will be compelled to commence a multiplicity of suits to protect his rights. The court also concluded as matter of law as follows: (1) That the dam of the defendant, the Billings & Eastern Montana Power Company, is a nuisance.

(2) That the defendant be compelled to abate said nuisance within a certain time, to be specified by the court. (3) That a decree be drawn in accordance with the foregoing order, and the plaintiff be given until May 1, 1909, in which to abate the nuisance or modify, change, and alter its dam. A decree was then entered in favor of the plaintiff, which decree contains the following order: "That the defendant, the Billings & Eastern Montana Power Company, be and is hereby ordered to rebuild and repair on or before the first day of May, 1909, its dam described in plaintiff's complaint in such manner as to remedy the evils found to exist by the court in its findings of fact, and, if said dam cannot be rebuilt or repaired so as to remedy said evils, then the defendant company shall remove the same. Provided, however, that, if said time for rebuilding or removal is not sufficient, then the same may be extended at the discretion of the court." From this decree and an order denying a new trial the defendant appeals.

1. It is contended that the cause should be reversed for the reason that the "testimony clearly preponderates against the decision of the lower court." We cannot agree with this contention. Appellant claims that the findings are based upon a mathematical impossibility, and, in support of this claim, counsel say: "The impossibility is shown by the fact that plaintiff's land is one-half mile upstream, the dam holds the water two feet above the (natural) bottom of the river, * * * and the fall of the river is ten or twelve feet to the mile. * * * We say that the statement that a dam two feet above the natural bottom of a stream backs water over the surface of the ground one-half mile upstream, when the fall of the river is ten to twelve feet to the mile, is incredible." And they argue that a verdict or decision based upon a mathematical impossibility cannot stand. We have read all the evidence. The testimony upon which appellant bases its contention is not scientific and is somewhat unsatisfactory; while, on the other hand, plaintiff's witnesses testified positively that the water was backed up by the dam to and over plaintiff's land, and that, on several occasions, it stood there for such a length of time as to become stag-

nant and foul, and this testimony is corroborated in some particulars by defendant's witnesses. We conclude that the findings of the court are sustained by substantial testimony, and that we ought not to disturb them.

2. Defendant offered to prove by the plaintiff that the "entire profit of the entire land or ranch has not been in any one year during the seven years immediately preceding 1908 as much as \$801." The court sustained an objection to the evidence as incompetent, and the ruling is assigned as error. The significance of the exact sum mentioned in the offer (\$801) has not been explained to us; but it is contended that the defendant had a right to have the testimony go to the jury as bearing upon the question of the impairment of the rental value of the land. The jury found that the rental value of the land had been decreased because of the construction and maintenance of the dam, but this finding, if at all pertinent, is probably only material to the question whether or not an injunction should issue, because no claim for damages is made by the plaintiff on account of impairment of rental value, and the damages awarded (\$200) may all be attributed to specific losses as to which he testified in support of his complaint.

3. The court refused to allow the defendant to prove that the plaintiff made no claim for damages, and gave the defendant no itemized statement thereof before the commencement of the action. It is admitted that no such demand was necessary in order to maintain an action for damages or to abate a nuisance; but it is argued the court should have received the testimony before deciding that the plaintiff would be driven to a multiplicity of suits. We think the testimony was properly excluded in view of what is hereafter to be said regarding the right of the plaintiff to injunctive relief based upon the findings of fact. Not only that, but the defendant is presumed to have intended the natural consequences of its act in maintaining the dam, and is therefore chargeable with notice of whatever conditions resulted from that act. It cannot complain, therefore, that the plaintiff failed to give notice that he had been injured and demand redress therefor. We do not decide that a court

of equity need not take into consideration in a proper case the fact that the defendant has had no notice of the plaintiff's claim, but only that in this case no error was committed in refusing to admit the testimony.

4. The main contention of the appellant is thus stated in the brief of its counsel: "The chief point to be considered in this case is on the relevancy and admissibility of the defendant's offer to show that its dam cost \$120,000 to build. We take it to be the law * * * in this jurisdiction that where the business carried on is a lawful business, such as lighting or furnishing a domestic water supply in convenient form to a city of twelve thousand or fifteen thousand people, then, before the court will issue its mandatory injunction demolishing the industry, it is the duty of the court to weigh and balance the respective inconveniences and losses of each party, and, if any other order will remedy such inconvenience, make such other order. * * * Balancing the comparative inconveniences and losses, * * * what is the inconvenience or detriment of Mr. Wilhite? A temporary absence of a month or two from home on the part of Mrs. Wilhite was all that it was claimed to have caused, with the exception of four tons of alfalfa hay, \$12 worth of strawberries, and the flooding of a root cellar, and the muddying of a path to the spring. * * * Against that we have the cutting out of a dam which supplies the people of Billings with water and light." And again: "We believe that no fair-minded man can say that the chancellor did not act erroneously in ordering this dam rebuilt by May 1, 1909. * * * A reasonable interpretation of the evidence would show that for the present an injunction that the flash-boards be taken off before the high-water season, which is a fixed season, would be sufficient injunction for the present." Also: "Is a judgment commanding defendant to *rebuild* proper when it is shown by the evidence that the entire added height above the original water level is caused by certain temporary structures called flash-boards, cheaply removable? Should the chancellor not have commanded a removal of the flash-boards during high water (a well-ascertained season, June and July) and withheld

his command to rebuild until the effect was ascertained of such removal of flash-boards, if there was any damage done last season, when the flash-boards were on?"

Several very recent cases bearing upon the duty of the chancellor under certain circumstances are called to our attention by the appellant's counsel, notably those cited by Judge Hunt in the circuit court of the United States for the ninth circuit, district of Montana, in deciding the case of *Bliss v. Anaconda Copper Mining Co.*—lately pending before him—(C. C.) 167 Fed. 342. But the difficulty we encounter is that the facts of this case do not bring it within the rules laid down in the cited cases. We have examined many of the cases referred to, and find that in these cases a strong showing was made at the trial, based generally upon allegations in the answer, which would warrant the court in concluding that the demand of the plaintiff, if granted, would result in so great damage to the defendant and to others dependent upon the defendant's operations, as that, in comparison therewith, the damage caused the plaintiff was insignificant. The offer was to prove that the dam cost \$120,000 to build. The witness Rowley, of whom the question was asked, had already testified that he and his associates built the dam and sold it to the defendant company on June 8, 1908; that it was in course of construction for over twenty years. He said: "We have been working on what is now the dam for quite a good many years. When we first dug the channel out, we went down to the bottom of the river bed. It was very much higher than it is now. About two years after we cut the canal in there, the channel deepened from what it had been, and we found we could not get the water in the canal. The surface of the water was so much lower than the canal, so we started to put an obstruction in there to hold the bottom up to pretty nearly the old original point, so we would be able to divert the water to the canal. We have been working hard with it for a number of years without succeeding in putting in anything in the shape of a dam. This was filled largely with rock, and we found that high water would destroy this rock dam more or less, so we put a concrete top on over the top of

the rock." There is in the record no testimony whatsoever that the defendant is supplying the city of Billings with light, power, or water, or that it is a public service corporation, or even that it is actually operating any part of its plant. The court found that the maintenance of the dam was a nuisance. Plaintiff's damage, although of small amount measured in money, is nevertheless substantial. No attempt was made to show that the defendant cannot avoid injuring plaintiff without tearing out its dam, or without great expense. So far as we know, it may easily be within the power of the defendant at slight expense to guard against any injury. The fact that the defendant's predecessors expended \$120,000 before they succeeded in completing the dam furnishes, in the light of Mr. Rowley's testimony as to the mistakes made and difficulties encountered, no evidence to us as to the magnitude of the defendant's interests at the present time.

It is suggested by counsel that all that is enjoined upon the defendant in the first instance is the removal of its flash-boards during the high-water season. But the testimony shows without contradiction that the flash-boards were not on the dam in June and July, 1908. The plaintiff was asked: "They would practically have to remove the entire dam in your opinion to obviate the bringing of the water around your house?" And his answer was: "No, I don't believe that."

Counsel for the defendant in their brief suggest several means which they would have been willing to adopt to save the plaintiff harmless had an opportunity been given. And it may also be suggested, if the statements in appellant's brief as to the nature of its business are correct, that condemnation proceedings might have the desired result. We take notice that this is the usual method of adjusting such controversies. But, as we read the record, this is a simple and ordinary case of maintaining a nuisance, to the plaintiff's damage. We, however, disagree with the court's conclusion that the dam itself is a nuisance.

The injunction order of the court below is entirely too broad and drastic. All the plaintiff may properly ask is that he be not injured in the future. There is no evidence that it is neces-

sary to rebuild, repair or remove the dam in order to accomplish this end. The order should command the defendant within a reasonable time to abate the nuisance which it is maintaining with reference to the plaintiff's property, and to refrain from causing him injury in the future, and, in order to accomplish the result herein commanded to be attained, that it shall employ the necessary and requisite means, whatever the same may be, to obey the order of the court, at its peril. This court will, in proper cases, order the entry of interlocutory restraining orders, either mandatory or prohibitory, as the case may require; but we find in this record no warrant for making such an order in this case.

The cause is remanded to the district court, with directions to modify the decree in accordance with the views herein expressed, and, as so modified, the same will be deemed affirmed. Appellant to pay the costs of this appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied May 5, 1909.

KNIPPENBERG, APPELLANT, v. GREENWOOD MINING &
MILLING CO. ET AL., DEFENDANTS; BENNETTS, RE-
SPONDENT.

(No. 2,840.)

(Submitted April 6, 1909. Decided April 16, 1909.)

[101 Pac. 159.]

*Promissory Notes—Agency—Intention of Parties—Ambiguity—
Parol Testimony—Admissibility.*

1. In an action to recover on a promissory note, signed by defendant and others with the word "Trustees" added to their signatures, defendant denied that he ever received any consideration for the note, and alleged that it had been executed by him as trustee of a mining company and not in his individual capacity, that the consideration expressed in it was received and enjoyed solely by the company, and

that it was so understood between defendant and the payee of the note at the time of its execution and delivery. At the trial the court, over objection of plaintiff, permitted defendant to introduce parol testimony in support of the affirmative allegations of the answer. *Held*, that the court's action was correct, the rule being, in such cases as this, that where a note is so ambiguous on its face as to leave it in doubt who is bound by it, parol testimony is admissible to solve the question.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Henry Knippenberg against the Greenwood Mining & Milling Company and others. From a judgment for defendant T. J. Bennetts, and from an order denying a new trial, plaintiff appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellant.

The admission of oral evidence showing that Bennetts was not personally liable, was error. (See *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Heffner v. Brownell*, 70 Iowa, 591, 31 N. W. 947.) The opinion in the latter case cites *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118, 9 N. W. 384, which in passing on a similar note holds that it creates a personal liability upon the individuals signing the same, and parol evidence to show that it was intended as the contract of the company is incompetent. (See, also, *Coburn v. Omega Lodge*, 71 Iowa, 581, 32 N. W. 513.) An instrument containing nothing in the body of it to show that it is made by an agent on behalf of a principal, but signed "A, agent for B," will be deemed the personal contract of A. (*Dawson v. Cotton*, 26 Ala. 591; *Tannatt v. Rocky Mountain etc. Bank*, 1 Colo. 278, 9 Am. Rep. 156; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Fiske v. Eldredge*, 78 Mass. 474; *McCandless v. Belle Plain Canning Co.*, 78 Iowa, 161, 16 Am. St. Rep. 429, 42 N. W. 635, 4 L. R. A. 396; *Tenbrook v. Ellars*, 71 Ill. App. 328; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *McBean v. Morrison*, 8 Ky. 545; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Nunnemacher v. Poss*, 116 Wis. 444, 92 N. W. 375.)

The amended answer of Bennetts seeks to set up the affirmative defense of mutual mistake, but it fails to set forth facts sufficient to constitute the defense attempted; hence, evidence in general terms, that the note was given by mistake and not evincing the true intention of the parties, is incompetent and inadmissible. (*Carr v. Dickson*, 58 Ga. 144; *Seeley v. Engell*, 17 Barb. (N. Y.) 530; 8 Cyc. 165.)

When an agent enters into a written contract upon which the name of his principal does not appear, he is personally liable. (Story on Agency, secs. 147, 155.) The use of the word "agent" alone, without saying for whom he is agent, is not sufficient to relieve the agent from responsibility or to bind the principal. (*Arnold v. Sprague*, 34 Vt. 402; *Ye Seng Co. v. Corbitt & Macleay*, 9 Fed. 425, 7 Saw. 368; *Armstrong v. Brolaski*, 46 Fed. 903; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612.)

Mr. R. L. Clinton, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment in favor of the defendant Thomas J. Bennetts and an order denying a motion for a new trial. The plaintiff, after stating the corporate character of the Greenwood Mining & Milling Company and the Hecla Mercantile and Banking Company, alleged as follows:

"(3) That on the seventh day of December, A. D. 1900, the said defendants, at the county of Silver Bow, in said state of Montana, for and in consideration of the sum of \$11,000 to them loaned and paid by the said Hecla Mercantile & Banking Company, made, executed, signed, and delivered to said Hecla Mercantile & Banking Company their promissory note for the sum of \$11,000, payable to said Hecla Mercantile & Banking Company or order, on or before one year after date, with interest thereon at the rate of eight per cent per annum, with attorney's fees of ten per cent of the amount of said note in

case suit should be commenced for the collection of said note, which note is in figures and words as follows, to-wit:

“ '\$11,000.00 Melrose, Montana, December 7, 1900.

“ ‘On or before one year after date, we promise to pay to the Hecla Mercantile and Banking Co., of Melrose, Montana, or order, Eleven Thousand Dollars, for value received, negotiable and payable at Bank in Glendale, in gold coin of the United States of America, of the present standard of weight and fineness, with interest thereon from date until paid, both before and after maturity, at the rate of eight per cent per annum, and ten per cent for attorney's fees if suit shall be instituted on this note for collection. The drawers and endorsers severally waive all exceptions of personal property allowed by the laws of the state, also waive presentment for payment, protest and notice of protest and non-payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders, to them or either of them.

“ ‘GREENWOOD MINING & MILLING Co.,

“ ‘Per D. T. HASKETT, President,

“ ‘ELMER L. KERN, Secty.

“ ‘THOMAS J. BENNETTS,

“ ‘CHAS. A. HARVEY,

“ ‘D. T. HASKETT,

“ ‘Trustees.

“ ‘[\$2.20 in revenue stamps affixed thereon.]’

“ (4) That afterward on the — day of December, 1900, for value received, said Hecla Mercantile & Banking Company, by its said vice-president, duly indorsed, sold, and transferred to said plaintiff, Henry Knippenberg, said promissory note, no part of which has been paid, and said plaintiff is now the owner and holder thereof, and the whole thereof is now due, owing, and payable from said defendants to plaintiff.

“ (5) That plaintiff duly notified defendants of said indorsement, sale, and transfer of said note, and that plaintiff was the owner and holder thereof, which indorsement is in words and

figures as follows, to-wit: 'Pay Henry Knippenberg, or order. The Hecla Mer. & Banking Co., Geo. B. Conway, V. Prest.' "

The respondent answered, in effect, by denying that he made, executed, or delivered the note as set forth in the complaint, and denying that the copy or pretended copy of the note therein set forth was a true or correct copy of any note or instrument executed by him at the time alleged therein or at any other time or at all. The cause went to trial before the court sitting without a jury, and during the course of the trial the court, over plaintiff's objection, allowed defendant Bennetts to file the following amended answer:

"As to paragraph 3 denies that this defendant made, executed or delivered the note set forth by copy in said paragraph 3 of plaintiff's complaint, and denies that the said copy or pretended copy * * * is a true or correct copy of any note or instrument as executed by this defendant at the time alleged therein, or at any time, or at all.

"(6) Denies that this defendant received any consideration for executing the said pretended note, but alleges the fact to be that the said note was executed by the defendant as trustee for said Greenwood Mining & Milling Company, and not otherwise, and that all the consideration expressed in said note was received, had, and enjoyed solely and exclusively by the said Greenwood Mining & Milling Company, and that this defendant at the time of the execution and delivery of said note was the duly elected, qualified, and acting trustee of the said Greenwood Mining & Milling Company and as such trustee, and not otherwise, made and delivered said note, and that in making and delivering said note this defendant acted only as such trustee for said Greenwood Mining & Milling Company in the execution and delivery thereof, and that this defendant did not execute or deliver said note as his individual note, and that it was understood and agreed by and between this defendant and payee of said promissory note at the time of the execution and delivery of same that said note was made, executed, and delivered by this defendant as the trustee of said Greenwood Mining & Milling Company, and not otherwise."

Plaintiff objected to the introduction of any testimony in support of the affirmative allegations of the amended answer, but the court overruled the objection, and the ruling is assigned as error. And afterward the court made the following findings of fact: "In this action, heretofore tried by the court, the court finds for defendant Bennetts, and concludes therefrom that plaintiff is not entitled to recover against him. In view of the fact the note involved was in form a joint and several note, was changed (and uselessly if still intended to bind all signers personally) to a joint form only—'we,' the proper designation of a corporation note, was signed with the defendant's corporate name, and that Bennetts signed with the suffix 'Trustee,' I am of the opinion the note is so far ambiguous on its face that Bennetts could allege and prove by parol that the parties knew and intended it was not his note, but the company's only, so signed by Bennetts as trustee out of abundant caution to make it so appear. * * * The evidence is conclusive it was not intended by the parties to the note that Bennetts should be bound personally and that it was intended as only the company's note, and that Knippenberg procured this to be done." Judgment was entered in accordance with said findings in favor of respondent Bennetts, and the plaintiff appeals as aforesaid. In said judgment the court incorporated the following additional findings and conclusions: "And the court finds in favor of the defendant Thomas J. Bennetts, and against the plaintiff, Henry Knippenberg, that the evidence is conclusive; that it was not intended by the parties to the note that the said Thomas J. Bennetts should be bound personally; that it was intended only as the note of the defendant company the Greenwood Mining & Milling Company, and that the said promissory note mentioned in said complaint was signed by the said Thomas J. Bennetts as trustee to bind the defendant company, and that the parties to this suit knew and intended that it was not the note of the said Thomas J. Bennetts, but the note of the Greenwood Mining & Milling Company only; and that the plaintiff is not entitled to recover against the defendant Thomas J. Bennetts."

It is contended that the affirmative allegations of the amended answer are not sufficient to constitute a defense, and that no parol testimony was admissible in support thereof. Counsel for the appellant, after calling attention to the confusion created by the different holdings of the courts on the subject in controversy, say in their brief: "Unless each case can be justified upon a true application of some recognized rule of law, then the books are full of opinions too irreconcilable to be of assistance in any given case." We quite agree with counsel. An examination of the authorities discloses several well-defined classes of cases, and the confusion has doubtless arisen where it has become necessary to apply the law to cases which, in the facts, bear some relation to the different classes. While counsel for the appellant who tried the cause in the district court was not able to be present at the argument, he has filed a brief which bears evidence of a most exhaustive and painstaking research of the authorities. One line of cases gives emphasis to the question whether the promise is made in the body of the note in the principal's name (see 7 Cyc. 551), while the principle applied in other jurisdictions is that instruments of this nature will always be construed as the parties made them without the aid of extrinsic evidence (*Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624). Mechem in his work on Agency, section 443, says: "To extract general principles from these cases whose conflict is so great as to amount, in the language of a recent case, almost to anarchy, is manifestly difficult. It will be obvious that the question is of importance in two classes of cases: (1) Those involving the rights of the immediate parties to the instrument only. (2) Those involving the rights of third persons. Respecting this question, however, these general rules may be evolved:

"(1) Where the paper on its face is the undertaking of the agent only, no reference being made on its face to representative capacity, and where the paper on its face is unmistakably the principal's, parol evidence will not be received in the one case to exonerate, and in the other to charge the agent.

“(II) But where the paper bears on its face some reference to a principal, or some appellation indicating representative character, while it is undoubtedly true that the mere addition of the word ‘agent,’ ‘trustee,’ ‘treasurer,’ and the like, or the mere recital in the body of the instrument that the person signing is such agent, treasurer, or trustee of a principal named or unnamed, is, as has been seen, to be regarded *prima facie* as *descriptio personæ* merely, and not as characterizing the act as one done in a representative capacity; and, while it is also true, as a general rule, that parol evidence is not admissible to exonerate an agent from a contract into which he has personally entered, yet it is believed that the preponderance of authority will warrant the statement of the rule that: (1) Between the immediate parties to a bill or note parol evidence is admissible to show (a) that, by a course of dealing between the parties, that form of execution has become to be the recognized and adopted form by which the obligation of the principal is entered into; or (b) that the instrument was to the knowledge of the parties intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such; (c) that an instrument which is so ambiguous upon its face as to render it uncertain who was intended to be bound was known to be intended to be the obligation of the principal. (2) Between one of the original parties and a third party such evidence is admissible to make either of the lines of proof mentioned above: (a) Where the third person is not a *bona fide* holder; or (b) where the instrument bears sufficient evidence upon its face, or is so ambiguous, as to fairly put a reasonably prudent man upon inquiry. As to this last subdivision it may be said that the mere addition of the word ‘agent,’ ‘trustee,’ etc., without disclosing the principal, is not sufficient to make third persons chargeable with notice of any representative relation of the signer; but the form of executing may be such as to well awaken the suspicion of third persons.”

Professor Wigmore, in his work on Evidence, section 2444, page 3449, says: “The question whether one who signs as ‘agent’ or ‘president’ or ‘guardian’ is personally liable seems to

be mainly a question of interpretation. * * * The question thus becomes one of the construction of the document."

There are several matters advanced in the brief of counsel for the appellant which are not pertinent to the main question involved. Considerable space is devoted to a discussion of an agent's authority to bind his principal, but no such question is involved here. No claim is made that the Greenwood Mining & Milling Company was not bound. In fact, it was made a party defendant in this action and suffered default. Neither is any question of undisclosed principal or unauthorized assumption of authority by an agent involved. The court found the evidence to be conclusive that it was not intended by the parties that Bennetts should be bound personally, that the note was intended to be that of the company only, and that Knippenberg procured its execution in the manner indicated. No significance attaches to the fact that mistake in execution is not pleaded or shown. The defense does not rest on that ground. The court having found that Knippenberg procured the arrangement to be made as claimed by Bennetts (and there is ample testimony to support it), he cannot now be heard to say that, unless Bennetts had authority to bind the company, he became personally liable. The question here is: Is the note sufficiently uncertain on its face as to who was intended to be bound thereby to warrant the court in receiving parol evidence of the circumstances surrounding its execution? We think an affirmative answer must be given.

This court in *Gerber v. Stuart*, 1 Mont. 172, laid down the rule thus: "While it appears on examination of the authorities, especially the older ones, that the addition to a signature of 'agent,' 'president,' 'superintendent,' and similar words has been held to be mere description of the person, and not of the capacity in which the party acted, the modern rule seems to be that, if from the whole instrument it appears that the party intended to act for and bind his principal, the principal and not the agent will be bound, and that, where the addition or description is so inartificially expressed as to leave it in doubt, or ambiguous, from the face of the instrument, evidence *aliunde*

will be admitted to explain and show the actual intention of the parties." Some claim was made in the *Gerber Case* that the defendant by mistake failed to sign "as" manager "for" the company; but the basis of the decision, as we read it, is that there was enough on the face of the note to raise the question, and make it uncertain, who was intended to be bound.

In the case of *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665, the court said: "The bank was requested by two persons, who sign themselves as officers, one as vice-president and the other as secretary, to pay a certain sum. Whether they made this request as officers or as individuals is ambiguous, to say the least. It is evident that an inquiry into the circumstances of the case might render it certain which was intended. * * * Where a person acts merely as agent of another, and signs papers in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility." (See, also, *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. Ed. 100.)

In the case of *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182, it was held that "a bill of exchange signed John Kean, President Elizabethtown & Somerville R. R. Co., leaves it ambiguous, on the face of it, whether John Kean, individually, or the company is the drawer," that without any explanatory proof Kean individually would be considered the drawer of the bill, but that evidence might be introduced to explain which of the two doubtful constructions was the intention of the parties. (See, also, *Hicks v. Hinde*, 9 Barb. 528.)

In *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330, the court said: "We know that to hold the letters 'Sec'y' as intended to be 'a description of the person' would be simply a legal fiction, false in fact. It would simply amount to rejecting the words as surplusage."

The supreme court of Mississippi in *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432, said: "Ordinarily, no extrinsic testi-

mony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde*. One of the few exceptions to this rule is, where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his name, in which case testimony may be admitted between the original parties to show the true intent."

In *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, it was said: "The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intentions of the parties." (See, also, *Haile v. Pierce*, 32 Md. 327, 3 Am. Rep. 139; *McClellan v. Reynolds*, 49 Mo. 312.)

The point is made by appellant that there is no allegation in the amended answer that he, Knippenberg, knew of the understanding between the parties at the time the note was executed. This is true; but no such objection was urged at the trial, and the testimony conclusively shows that plaintiff, who was president of the Hecla Mercantile & Banking Company at the time, was the person who supervised and directed the entire transaction; that "the reason the note was signed by Bennets, Haryey, and Haskett on the lower left-hand corner was because it was the wish of Mr. Knippenberg that the trustees should sign the note to make it a legal note on the part of the Greenwood Mining & Milling Company." The record shows that the sole question presented to the district court was whether parol evidence was admissible to show the understanding and agreement between the parties at the time of the execution of the note.

We think that *Gerber v. Stuart*, *supra*, was decided according to principles which are sound in law and equitable in their application, and we therefore have no hesitancy in following it. Under the facts disclosed by the record, it would be unconscionable to allow the plaintiff to collect the amount of this note from Bennetts. We are therefore of opinion that the district court

correctly decided the case, and the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

HARRINGTON, APPELLANT, v. BUTTE, ANACONDA & PACIFIC RAILWAY CO., RESPONDENT.

(No. 2,639.)

(Submitted April 5, 1909. Decided April 16, 1909.)

[101 Pac. 149.]

*Personal Injuries — Excessive Verdict — Remission by Court —
New Trial — Conditions — Compliance with — Effect — Waiver.*

New Trial—Conditions—Power of Courts.

1. Courts have power to impose as a condition precedent to the denial of defendant's motion for a new trial, that plaintiff shall remit such portion of the damages awarded by the jury as is deemed excessive.

Same—Conditions—Final Order.

2. Upon the filing of a written acceptance of the condition imposed by the court that plaintiff remit so much of the verdict of the jury as it deemed excessive or submit to a new trial, the order becomes a final order denying a new trial.

Excessive Verdict—New Trial—Conditional Order—Compliance—Waiver of Irregularities.

3. Plaintiff in a personal injury action had judgment for \$7,500. The court denied a motion for a new trial, provided plaintiff remit all damages in excess of \$4,000. This plaintiff did, but in his written acceptance of the condition imposed stated that he did so "if the court had jurisdiction to make the order," he claiming that the court was without jurisdiction to make the order in that notice of intention to move for a new trial had not been given. He then appealed. *Held*, that, by filing his acceptance of the condition precedent to the denial of a new trial, plaintiff waived any irregularity in the proceedings on the new trial motion and could not appeal from the order.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Jeremiah P. Harrington against the Butte, Anaconda & Pacific Railway Company. From an order denying a

new trial provided plaintiff remit a portion of the verdict, he appeals. Dismissed.

Mr. John J. McHatton, and Mr. Peter Breen, for Appellant.

Messrs. Forbis & Evans, and Mr. D. Gay Stivers, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by plaintiff for damages as compensation for loss of services of his minor child by reason of a personal injury occasioned by the negligence of the defendant. On a former appeal a new trial was ordered on the ground that the evidence was insufficient to justify a verdict for plaintiff. (37 Mont. 169, 95 Pac. 8.) The second trial resulted in a verdict and judgment for the plaintiff for \$7,500. Defendant having moved for a new trial, the court made the following order: "This day all objections to hearing of defendant's motion for a new trial are by the court overruled, and defendant's motion for a new trial is denied, provided within fifteen days herefrom plaintiff remit all damages in excess of \$4,000; otherwise a new trial granted on the issue of the amount of damages only." The plaintiff within fifteen days thereafter filed with the clerk a written statement, which, after reciting the proceedings had at the settlement of defendant's bill of exceptions and upon the motion for a new trial, concludes as follows: "And this plaintiff, believing that the court and judge were without jurisdiction to settle said bill of exceptions, or to hear or determine defendant's motion for a new trial on said bill of exceptions, no notice of intention to move for a new trial having been given, does hereby remit all damages in excess of \$4,000, if the court had jurisdiction to make said order, reserving his objection to the jurisdiction of the court and all of his rights thereunder, so that no new trial may be had under said order." Thereupon he appealed.

When the record was filed in this court, defendant submitted a motion to dismiss the appeal on the ground that the order is not appealable, for the reason that it is interlocutory and conditional, and does not finally dispose of the application for a new trial. Consideration of the motion was deferred until hearing on the merits, which has now been had. Plaintiff contends that such a conditional order becomes final and absolute upon the happening of the condition, or upon its being complied with, and since it appears from the bill of exceptions that the plaintiff filed a written acceptance of the condition imposed by the order, it has become final, subject to plaintiff's right to question on appeal the jurisdiction of the court to make the order, upon the ground that the notice of intention had not been given.

The rule that courts have power to impose, as a condition precedent to the denial of defendant's motion for a new trial, that plaintiff shall remit such portion of the damages awarded by the jury as is deemed excessive, has frequently been recognized by this court. (*Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448; *Gilmer v. Kennon*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506; *Lewis v. Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469.) No question is made here as to its correctness. It is assumed by the plaintiff that the order became final upon his compliance with the condition imposed, and that no further order is necessary. In other words, it is said that, upon the filing of the written acceptance of the condition imposed by the court, it became a final order denying defendant's motion for a new trial. While the wording of the order is somewhat peculiar, we think this is the proper construction to give it. Upon compliance with the imposed condition, if there was a compliance, nothing further was necessary than to amend the judgment so as to make it conform to the reduced verdict. Upon a failure of compliance, the cause would have stood for a new trial. (*Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194; *Brown v. Cline*, 109 Cal. 156, 41 Pac. 862; *Bledsoe*

v. *Decrow*, 132 Cal. 312, 64 Pac. 397; *Bonelli v. Jones*, 26 Nev. 176, 65 Pac. 374.)

The language of the plaintiff's acceptance of the condition is: "And this plaintiff * * * does hereby remit all damages in excess of," etc. The reservation, expressed in the form of a condition, is in fact no condition, but the reservation of an exception expressive of an intention to question the power of the court to make the order at all. If he had this right to question the court's power, he had it without the reservation; but he could not comply with the condition imposed and still say the court had no power to impose it. He could not say, "I accept the advantage offered me of avoiding a new trial, but I will proceed to test the question whether the court had the power to grant me this advantage; and if I find that the power does not exist, I will be the gainer to the amount of \$3,500, while my adversary, if he chooses to submit to the order, becomes the loser to this amount." The only course open to him was to waive all irregularity in the proceedings on the motion and comply with the order, or to refuse to comply at all. He would then have been in a position to question the regularity of the proceedings on the motion anterior to the order. As it is, he cannot be heard to say that the order in his favor made so by his own act of acceptance of its conditions, is not binding upon him, or that he is aggrieved by it. Taking either view of the case, the plaintiff's contentions are without merit. If the order did not by his act become absolute, the appeal is premature, and defendant's motion to dismiss it must be sustained. If it did become absolute, the order is in his favor, made so virtually by his consent, and hence he cannot say that he has been aggrieved by it. The situation is anomalous, to say the least, and not without difficulty; but we are not disposed to adopt a view which recognizes a right in litigants to juggle with a court, as plaintiff has shown a disposition to do in this case. We hold that by filing his acceptance, couched in the terms it is, the plaintiff waived any irregularity in the proceedings on the motion, and that, having thereby avoided

another trial, he has no grievance which he may submit to this court. The appeal is therefore dismissed on this ground.

There may be some question whether the court may, in such a case as this, grant a new trial upon the issue of damages only. This question does not arise here, and as to it we venture no opinion.

Dismissed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: My opinion is that when the plaintiff agreed to accept \$4,000, provided the court had jurisdiction to make the order, he reserved no substantial right, but only an abstract question of law. The matter of how that legal question should finally be decided bore no relation to the fact question as to what amount would compensate plaintiff for the injury suffered by him. It was purely a speculation on his part. I therefore concur in the foregoing disposition of the case.

PENGELLY, APPELLANT, v. PEELER, ADMINISTRATOR, RE-
SPONDENT.

(No. 2,644.)

(Submitted April 7, 1909. Decided April 16, 1909.)

[101 Pac. 147.]

Default — Setting Aside — Discretion — Pleadings — Answer — Denials.

General Denial—When Proper.

1. A general denial is proper in cases where the pleader has theretofore generally or specifically denied certain allegations of the complaint, as also where he has denied any knowledge or information sufficient to form a belief as to the truth of particular allegations, and has specifically admitted others.

Denial on Information and Belief—Sufficiency.

2. Where defendant denied, as to certain specified allegations of the complaint, that he had "any knowledge or information [thereof] sufficient to form a belief," the omission of the word "thereof," used

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in section 6540, Revised Codes, authorizing denials on information and belief, was immaterial.

Default—Setting Aside—Answer—Affidavit of Merits—Inconsistency.

3. The complaint in an action to recover on a claim against an estate, alleged, *inter alia*, that the plaintiff had duly presented her claim to the administrator in writing, supported by affidavit as required by law. The default of the administrator having been entered, defendant, on motion to set aside the default, tendered a proposed answer containing a general denial. In his affidavit of merits he stated that the claim delivered to him had not been verified as prescribed by law and was therefore not a legal claim against the estate. *Held*, that the answer was not so inconsistent with the statements in the affidavit as to warrant the court in refusing to set aside the default.

Same—Setting Aside—Discretion—Terms.

4. In setting aside a default judgment, on a showing that defendant's attorney, through mistake and inadvertence, failed to file an answer within the time allowed by law, where the party in default moved promptly to vacate the judgment and appeared to have a good defense to the action, the court did not abuse its discretion; nor did it err in not imposing terms.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by Catherine Pengelly against D. R. Peeler as administrator of Jacob Fine, deceased. From an order setting aside a default judgment, and permitting defendant to answer, plaintiff appeals. Affirmed.

Mr. Charles W. Pomeroy, and Messrs. Carpenter, Day & Carpenter, for Appellant.

Mr. C. H. Foot, and Mr. W. H. Poorman, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from an order of the district court of Flathead county setting aside a default judgment and permitting the defendant to answer. The plaintiff, who was sister to the deceased, Jacob Fine, filed a claim against his estate in the sum of \$500, for work, labor and services performed by her during the years 1901 to 1906. The administrator rejected the claim, and this action resulted.

Summons was personally served on May 29, 1908, default entered on June 19, and judgment entered June 20, 1908. On

June 24 motion and notice of motion to vacate the judgment were served and filed, accompanied by the affidavits of the defendant and C. H. Foot, Esq., his attorney. The affidavit of Mr. Peeler contains the following allegations: "That through mistake, inadvertence, and neglect of himself and his counsel, C. H. Foot, he was prevented from appearing and answering in said action, as shown by the affidavit of his counsel hereto attached, and the following statement: That on the second day of June, 1908, he delivered to said counsel the summons and complaint in said action served upon him; that he does not remember whether at that time he told his counsel when the summons and complaint were served upon him, but believes he did; that he briefly discussed the case with his counsel, and then left him, instructing said counsel to look after the case and see that the answer was properly filed, and his said counsel assured him that he would do so. This affiant had just returned the morning before from a three weeks' absence from the city of Kalispell, his home, and found a great deal of business accumulated during his said absence, and that for several days succeeding the delivery of said papers to his counsel, he was exceedingly busy with his duties as president of the First National Bank of Kalispell, and had no time to give thought to said action, and, relying upon the promises of his said counsel, did not attempt to charge his mind therewith." This averment is followed by an affidavit of merits.

In Mr. Foot's affidavit is found the following: "That on the second day of June, 1908, said D. R. Peeler called upon affiant in his office, in the city of Kalispell, and delivered to him a copy of the complaint and summons in the above-entitled action; that said defendant inquired of affiant what he had to do with the papers served upon him, and affiant replied that he would have to answer and defend in said action. The merits of the case were but briefly discussed between affiant and defendant at that time, as both had been aware for some time that such an action was to be commenced, and the merits of the case had been thoroughly discussed on previous occasions, and all the facts known to said defendant were known to affiant at

that time, as he verily believes. In just what manner the information was conveyed affiant is unable to state, but at that time, to-wit, June 2, 1908, affiant understood and believed from the conversation he had with said defendant that said summons had been served upon defendant that day, and that, immediately after the defendant left his office, he entered upon his desk calendar the date when time for answering would expire, to-wit, June 22, 1908; that affiant at no time forgot that the day for answering, as he understood it, was on the twenty-second day of June, 1908, and he at all times fully intended to prepare his answer to said complaint, and have the same filed within the twenty days from the date of the service of the summons, and would have done so but for the misunderstanding between himself and said defendant; that just about the time said action was commenced affiant conversed with plaintiff's attorney, Charles W. Pomeroy, Esq., concerning the same, and their conversation was to the effect that the said case could not be reached for trial until late in the fall of the year 1908, as both parties to the action would have to take depositions of witnesses, all of whom, as to the facts and merits of the case, reside in England, as affiant is informed and believes. For this reason, and as no trial jury was expected till November, 1908, he made no haste to get the case at issue, therefore delayed preparing the answer until the 20th of June. In preparing to serve his answer he discovered for the first time that default had been entered in said action against said defendant. He immediately interviewed plaintiff's attorney, and informed him of his intentions to move to vacate the default, and asked plaintiff's attorney to consent to its being vacated, and to not enter the judgment on the default. This plaintiff's counsel at that time declined to do, and affiant then began the preparation of the papers necessary to vacate said default."

An answer was tendered, admitting the death of Jacob Fine, the appointment and qualification of the defendant as administrator of his estate, and the publication of notice to creditors to present their claims within four months. As to the allegations that plaintiff performed work and services for deceased in his

lifetime of the value of \$500, for which she has not been paid, the answer sets forth: "As to each, every, and all of the allegations, matters, statements and things in the first and second paragraphs of the said complaint defendant denies that he has any knowledge or information sufficient to form a belief." Then follows a denial of "each and every allegation in said complaint contained not herein specifically admitted or denied."

But one question is argued in the briefs, to-wit, whether the court below abused its discretion in vacating the judgment; but on the argument two other contentions were advanced by counsel for the appellant.

(a) It was contended that the denial of knowledge or information sufficient to form a belief does not put in issue the allegations of the complaint to which it is directed. The denial is in the words of the statute, with the exception that the word "thereof" is omitted. Section 6540, Revised Codes, provides: "The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer." We hold that under this statute a defendant may deny generally or specifically certain allegations of the complaint, and may, as to other allegations, deny any knowledge or information thereof sufficient to form a belief, and may admit other allegations, and may put still others, or all others, in issue by a general denial; and we think this construction has generally been adopted and acted upon by the profession. Under this rule of construction a general denial is proper in cases where certain allegations have already been generally or specifically denied, and in cases where the pleader has already denied any knowledge or information sufficient to form a belief as to the truth of particular allegations, and has specifically admitted others.

The appellant cites the case of *Downing N. D. Land Co. v. Burns*, 30 Colo. 283, 70 Pac. 413, in which the supreme court

of Colorado held the answer insufficient. But in that case the denial was in this form: "This defendant hath not and cannot obtain sufficient information upon which to base a belief." The court held that the defendant was required by statute to state that he had no *knowledge* or information upon which to base a belief. In the case of *Jurgens v. Wichmann*, 124 App. Div. 531, 108 N. Y. Supp. 881, the supreme court held the following to be no denial: "Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph 5 of the complaint." And again, in *White v. Gibson*, 61 Misc. Rep. 436, 113 N. Y. Supp. 983, the same court held that this allegation in an answer raised no issue: "It alleges that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the articles of the amended complaint marked '1' to '8.'" The court said that such denials and allegations were "too slovenly and loose." But we think the answer in this case is sufficient in this regard. The decisions of the supreme court of New York are exceedingly technical, and we are not disposed to follow them. Neither is the decision of this court in *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995, in conformity with them. Section 6566, Revised Codes, reads: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." We do not regard the omission of the word "thereof" as of any consequence, when it is apparent that the subject of the denial was certain specified allegations in the complaint.

(b) It is contended that the general denial in the answer is inconsistent with certain statements contained in the affidavit of merits, and is therefore not effective to put in issue the allegation that plaintiff's claim was presented to the administrator and rejected. The statement in the affidavit is as follows: "That after affiant was appointed administrator of said estate, there was delivered to him a pretended creditor's claim in favor of said plaintiff against the estate of said deceased, but that said claim was never verified or sworn to, or made under oath

by said claimant, in the manner provided by law, and was therefore not a legal claim against the estate; that affiant was informed and believed, and still does believe, from the information he had received that said claim was not just, and ought not to be allowed, and was instructed by Eliza Fine, the sole heir of said deceased, not to allow said claim, and for the further reason that said claim was not properly verified he rejected the same; that a full, true, and correct copy of said pretended claim, as served upon him and by him rejected, is hereto attached and hereof made a part." The allegation in the complaint is: "That on the eleventh day of January, 1908, plaintiff duly presented to said administrator her claim, hereinbefore mentioned, in writing, supported by her affidavit in due form as required by law," etc. We find no such inconsistency between the answer and the affidavit as would warrant the district court in refusing to vacate the judgment on that ground. An inspection of the copy of the claim leads to the conclusion that the defendant, in the protection of the estate intrusted to his care, might without impropriety question the sufficiency of the claim as presented, and we understand that this is what he seeks to do by the answer.

It would serve no useful purpose to analyze the allegations of the affidavits upon which the court below based its action, or to review the authorities on the subject. This court has had occasion to consider such orders so often that the principle of law involved is well settled. (*Loeb v. Schmith*, 1 Mont. 87; *Mantle v. Largey*, 17 Mont. 479, 43 Pac. 633.) Every case must be decided upon its own facts. The respondent promptly moved to vacate the judgment. We are of opinion that the district court did not abuse its discretion in granting the defendant's motion and vacating the judgment without imposing terms, and the order appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

TREVARTHEN, APPELLANT, v. PEELER, ADMINISTRATOR,
RESPONDENT.

(No. 2,643.)

(Submitted April 7, 1909. Decided April 16, 1909.)

[101 Pac. 149.]

[For syllabus, see *Pengelly v. Peeler*, ante, p. 26, 101 Pac. 147.]

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by Mary Trevarthen against D. R. Peeler, as administrator of Jacob Fine, deceased. From an order setting aside a default judgment, and permitting defendant to answer, plaintiff appeals. Affirmed.

Mr. Charles W. Pomeroy, and Messrs. Carpenter, Day & Carpenter, for Appellant.

Mr. C. H. Foot, and Mr. W. H. Poorman, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The record in this case discloses substantially the same situation as that found in *Pengelly v. Peeler*, ante, p. 26, 101 Pac. 147, and on that authority the order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ETTIEN, APPELLANT, v. DRUM, RESPONDENT.

(No. 2,584.)

(Submitted April 8, 1909. Decided April 19, 1909.)

[101 Pac. 151.]

Claim and Delivery—Live Stock—Sales—Contracts—Construction—Evidence—Instructions—Nonprejudicial Error—Hearsay Testimony.**Live Stock—Sales—Contracts—Construction.**

1. Evidence examined, in an action in claim and delivery to recover a number of cattle, alleged to belong to plaintiff by virtue of an oral contract of sale under which he became the owner of the brand and of all the cattle bearing it, whether actually delivered or not, and held to show the contract to have been that only such cattle as were actually delivered to plaintiff and paid for at the rate per head agreed upon should become his property.

Same—Instructions—Nonprejudicial Error.

2. Defendant claimed to have purchased the cattle in dispute from one D., who theretofore had sold to plaintiff the major portion of the herd with the brand, under the contract referred to in the foregoing paragraph. The question before the jury was whether D. had sold to defendant cattle previously sold and delivered to plaintiff. In an instruction the court defined the term "innocent purchaser," and plaintiff objected to the definition and suggested an amendment, which the court refused. Held, that the question whether defendant was an innocent purchaser was not in the case, inasmuch as, if defendant bought cattle which belonged to plaintiff by actual purchase and delivery, the latter could recover irrespective of the good faith of defendant, and that therefore the refusal of the court to permit the amendment was not prejudicial error.

Same—Hearsay Testimony—Harmless Error.

3. The statements of a bank officer, who testified partly from personal knowledge as to transactions between the parties, partly from statements made to him by them, and partly from knowledge obtained by cashing checks covering the transactions, could not be said to have been strictly hearsay, and an order refusing to strike such testimony did not constitute reversible error, especially where from other evidence it appeared that plaintiff could not have suffered prejudice from the ruling.

Same—Verdict—Evidence—Sufficiency—Review.

4. Where the evidence in an action in claim and delivery was almost wholly circumstantial and in such a condition that the mind was left in doubt as to the justness of plaintiff's claim, upon whom was the burden of proof, a verdict in favor of defendant will not be disturbed on appeal under an assignment that it is not supported by the testimony.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by William Ettien against H. B. Drum. Judgment for defendant, and from it and an order denying him a new trial, plaintiff appeals. Affirmed.

Mr. W. M. Johnston, for Appellant.

Mr. Fred H. Hathhorn, and *Mr. Harry A. Groves*, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This cause has been four times tried and twice heretofore appealed. (See *Ettien v. Drum*, 32 Mont. 311, 80 Pac. 369; also, 35 Mont. 81, 88 Pac. 659.) The result of the last trial was that defendant had a verdict and judgment, and plaintiff appeals from the judgment and from an order denying a new trial. For a statement of the facts reference is made to the opinion rendered upon the last appeal. Three contentions are now advanced: (1) That the court erred in not striking out certain testimony of the witness Warr; (2) that the court erred in defining an innocent purchaser; (3) that the verdict is not sustained by the evidence. We shall first consider the second specification.

1. Let it be recalled that Ettien claims to have purchased of Deaton all of the "pitchfork" brand cattle, and that forty-two head of said cattle were afterward sold by Deaton to Drum. These are the cattle in controversy. The plaintiff's amended reply alleges "that the plaintiff was to pay \$33 per head for said cattle when delivered and counted out at said two deliveries." Plaintiff testified: "On the fifth day of August six hundred and seven head were delivered. I paid for these cattle at the rate of \$33 per head. There were ninety-eight cattle in the second delivery. I paid for them. Under the terms of this contract, I was to pay \$33 per head for every animal delivered to me. I understood that whatever cattle were not delivered to me on the 25th of August, the date of the second delivery, were then my property. Under the terms of the contract, I was to be the owner of fifty-five undelivered

cattle, without paying any money for them if there were any undelivered. I didn't know that there were any left at all. There was not to be any contingency in our contract. He was to gather and deliver all the cattle at Utica. If they were not all delivered, I understood I was the owner of them without paying the \$33 per head for them. At the time I purchased the cattle and closed this deal, I knew nothing about the number of 'pitchfork' cattle Deaton owned, except what they told me. I bought the entire band with two deliveries. I paid about \$3 a head more than the cattle were worth, expecting to find a few not delivered in the length of time he agreed to deliver in. Deaton was at Utica when the second delivery was made in September, 1900. At that time Deaton said he was short thirty head of these cattle, and didn't know what he was going to do about it. I told him I couldn't receive any more under that contract without we both knew that they were cattle that had not been delivered before. I would have received any cattle I knew I hadn't received before. If I were satisfied of that, Deaton could make a delivery of the balance in a third delivery. That is what I told him." Austin Warr testified for the defendant, and plaintiff denied having had a great part of the conversation which Warr said took place between plaintiff, himself, and Deaton; but these statements of Warr's he did not deny, viz.: "Nothing whatever was said by Deaton to Ettien at the time of the sale as to who should be the owner of any cattle that were not delivered to Ettien by Deaton. Ettien was to pay Deaton \$33 per head by the head delivered. The sale of the herd in its entirety was not mentioned. Some time after the sale of the cattle, in a conversation I had with Mr. Ettien in regard to his refusal to take the remainder of the cattle when Deaton took them to Utica to deliver them, Ettien told me that he considered the cattle to be his, and that at the time Deaton agreed to turn over the 'pitchfork' brand he, Ettien, figured that Deaton would not be able to gather and turn over all of the cattle at the times fixed for the two deliveries, and that he, Ettien, would get the extra cattle that much cheaper." Deaton testified: "Ettien was to pay me \$33 per head for the cattle

when I counted them out and delivered them at Lewistown. I delivered seven hundred and five head of cattle and was paid for them. I was not paid for any cattle except those I delivered."

We quote the testimony of these two witnesses on the part of the defendant to show that they substantially corroborate the plaintiff as to what the contract was. Warr also testified, without contradiction, that the two receipts given by plaintiff to Deaton "stated the price to be \$33 per head." The bill of sale of the cattle, signed by Deaton and delivered to Ettien by Warr, recited: "That I, W. D. Deaton, * * * for and in consideration of the sum of \$25,080, * * * do sell to [Ettien] * * * seven hundred and sixty head of stock cattle branded [pitchfork] on left shoulder. It is intended hereby to include and convey * * * all cattle branded with said brand and owned by said [Deaton] and also to * * * sell * * * to said [Ettien] all right, title, and interest in and to the said [pitchfork] brand and in and to the use thereof." The purchase price of seven hundred and sixty cattle at \$33 per head would amount to \$25,080; but we have no hesitancy in holding from plaintiff's own testimony that the contract was that only such cattle as were actually delivered to him and paid for at the rate agreed upon should become his property. The bill of sale, viewed in the light of their actions, was not the contract between them. It is admitted that plaintiff never paid the full amount of \$25,080, but only seven hundred and five times \$33, or \$23,265. It is true that plaintiff testified, and also told Warr, that he expected to get all cattle not actually delivered for nothing, but he does not incorporate any such understanding in any agreement which he claims to have had with Deaton; and his evidence that he would have been willing to receive cattle after the second delivery, providing he was satisfied that he had not previously received the same animals, seems inconsistent with what he now claims to have been his understanding of the contract. If plaintiff was, by virtue of the bill of sale, to become the owner of all cattle not actually delivered, and Deaton had seven hundred and sixty cattle, which the evidence

tends to show that he did, then it would seem to follow that plaintiff would be liable for the balance of the purchase price over and above \$23,265. But such was not the contract. The contract was as heretofore stated, and all parties seem to have so understood it. This being the case, no question should have arisen at the trial as to whether or not Drum was an innocent purchaser. If defendant bought from Deaton any of the cattle which belonged to Ettien by actual purchase and delivery, then plaintiff could recover those cattle in this action, or their value, however innocent Drum may have been in the transaction of purchase.

The court at the request of the defendant gave the jury this instruction: "You are instructed that the transfer of personal property, such as cattle, is conclusively presumed, if made by a person having at the time the possession or control of the property, and, if not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property transferred, to be fraudulent and therefore void, as against the purchaser in good faith, subsequent to the transfer; so that in this case plaintiff can only recover cattle actually delivered to him by Deaton, unless the defendant Drum was not a purchaser in good faith. The term 'good faith' means one who buys honestly for a valuable consideration, and without notice of the rights of other parties." To this requested instruction plaintiff made the following objection: "Plaintiff objects to defendant's offered instruction 3, for the reason that the definition of an innocent purchaser contained therein should have added, 'or without such notice as would put a reasonably prudent man on his inquiry, which inquiry, if followed up, would inform him of the prior sale of the property in question.' " If the plaintiff had objected to the giving of any instruction on the subject, we are not prepared to say that his position would not have been well taken; but the additional matter which he sought to have incorporated therein could not have aided the jury in determining the real issue in the case, which was: Did Deaton sell to Drum any of the cattle previously sold and delivered to Ettien?

2. The witness Warr gave his evidence by deposition. On direct examination he testified that Deaton bought seven hundred and seventy-one head of cattle of various persons in the spring and summer of 1900; that he bought two hundred and forty-six of these of one Anderson. On cross-examination he said: "I know of my own personal knowledge that Deaton purchased seven hundred and seventy-one head as stated in my direct examination. He may have purchased others, but I know of no others. As to my knowledge of the cattle purchased, it was obtained in part by seeing the cattle, by cashing Deaton's checks given in payment thereof, by statements made by Deaton, corroborated by the statements made by those from whom he purchased the cattle. I know that Deaton purchased from Anderson during the spring of 1900 a band of cattle said to number two hundred and forty-six head, and I know that Deaton paid Anderson for two hundred and forty-six head of cattle, my knowledge being obtained from statements made by Anderson, and further by the payment of the checks given to Anderson in payment of the cattle." Warr was an officer of the Bank of Fergus County. Appellant moved to strike out the testimony that Deaton purchased two hundred and forty-six cattle from Anderson because the same was hearsay. The court denied the motion to strike, and appellant assigns error. We doubt whether this testimony was strictly hearsay. Warr exhibited some personal knowledge, and the whole matter was more a subject for argument to the jury than ruling by the court. Moreover, in view of other testimony in the case, we do not think that plaintiff suffered any prejudice from the ruling.

3. It is insisted that the cause should be reversed for the reason that the verdict is not supported by the testimony. We have given this assignment serious consideration, and conclude that we ought not to disturb the judgment of the court below. As to one particular animal the testimony seems to us to preponderate in favor of the plaintiff, and there may be serious question as to a few others; but on the whole the evidence is in such condition, being almost wholly circumstantial, as to leave the mind in doubt whether Drum ever received from

Deaton any of the same cattle previously delivered to Ettien. The burden was upon plaintiff to prove that he did. We cannot say the verdict in its entirety is not supported by substantial testimony, and the judgment and order of the district court of Yellowstone county are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

HOVEY, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
CO., APPELLANT.

(No. 2,641.)

(Submitted April 6, 1909. Decided April 19, 1909.)

[101 Pac. 146.]

Actions—Dismissal—Nonappealable Order—Final Judgment.

1. An order dismissing an action for failure of defendant company to demand and have entered a judgment in its favor within six months after rendition of verdict, is not a final judgment nor an order from which an appeal may be taken.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by L. L. Hovey against the Northern Pacific Railway Company. Order dismissing the action for defendant's failure to have judgment entered, and defendant appeals. Appeal dismissed.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. K. F. Gaines, for Appellant.

No appearance for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1906, L. L. Hovey commenced an action in the district court of Missoula county to recover damages from the Northern Pacific Railway Company. Issues were joined, a trial was had, and on March 5, 1907, the jury returned a general verdict in favor of the defendant. The defendant failed to have a judgment entered on the verdict, and on July 24, 1908, a motion was made by counsel for plaintiff to dismiss the action upon the ground that the defendant had neglected for more than six months after the rendition of the verdict to demand and have entered a judgment in its favor. The record then recites "that thereafter, and on August 14, 1908, the court * * * made its order that said cause be dismissed, which order was in words and figures as follows: ' * * * A motion to dismiss this action having been argued and submitted on the eighth day of August, 1908, and it appearing to the court that the defendant, the party entitled to judgment, has for more than six months after verdict, neglected to demand and have the same entered, it is hereby ordered that said action be dismissed.' "

The notice of appeal to this court is as follows: "To L. L. Hovey, the above-named plaintiff, and to Messrs. Hall & Patterson, his Attorneys: You and each of you will please take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of the state of Montana from that certain judgment made and entered in the above-entitled action on the 14th day of August, 1908, dismissing said action." We have searched the record in vain for any judgment. The order dismissing the case is not a final judgment. (*Butte & Boston Con. Min. Co. v. Montana Ore Pur. Co.*, 27 Mont. 152, 69 Pac. 714; *Palmer v. Spaulding*, 34 Mont. 1, 85 Pac. 369.) Nor is it one of the orders enumerated in section 7098, Revised Codes, from which an appeal may be taken.

For the reason that this court has not jurisdiction to consider this appeal upon the merits, the appeal is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

**SUMMERS ET AL., APPELLANTS, v. SULLIVAN, COUNTY DRAIN
COMMR., RESPONDENT.**

(No. 2,645.)

(Submitted April 8, 1909. Decided April 19, 1909.)

[101 Pac. 166.]

Drains—Injunction—Complaint—Married Women—Parties.

Drains—Injunction—Will not Lie, When.

1. Possible depreciation of farm lands, by reason of the impairment of water rights appurtenant thereto, which may be caused by the laying out of a public drain across them, is not of itself sufficient cause for the issuance of an injunction to prevent its construction. This is an element to be considered in assessing damages to the owner in proceedings had under the drain statute. (Revised Codes, secs. 2412 *et seq.*)

Same—Statutory Provisions—Failure to Comply with—When Immaterial.

2. In his application to the district court asking the appointment of special commissioners to determine the necessity of a proposed drain and the just compensation to be made for the taking of real property of certain land owners, who would not consent to the release of a right of way or forego the damages which would accrue to them by reason of the construction of the drain, the drain commissioner, among others, described the lands of a certain one of such owners, but failed to set out her name, as required by section 2415, Revised Codes. *Held*, that this omission did not render the whole proceeding void.

Same—Injunction—Complaint—Insufficiency.

3. Where the complaint of a number of land owners asking an injunction against a drain commissioner to restrain him from proceeding with the establishment of a public drain over their lands, failed to state that a certain one of them was not a party to proceedings had under the drain statute (Revised Codes, secs. 2412 *et seq.*), that she was not served with citation, that she did not appear and contest the right of the commissioner to proceed, and that the special commissioners did not hear her and assess and award to her adequate damages, it was insufficient as to her.

Same—Married Women—Parties.

4. A married woman having only an inchoate right of dower in her husband's lands over which a right of way for a public drain is sought to be secured under the drain statute need not be made a party to the proceedings.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by Elmer G. Summers and others against D. F. Sullivan, as drain commissioner of Yellowstone county. From a judgment for defendant, plaintiffs appeal. Affirmed.

Mr. W. M. Johnston, for Appellants.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to August, 1908, D. F. Sullivan, the county drain commissioner of Yellowstone county, received a petition for the establishment of a certain public drain. Proceedings were had thereupon pursuant to the provisions of our drain statute. (Revised Codes, secs. 2412 *et seq.*) Certain land owners over whose property it was sought to secure a right of way for the drain refused to release the right of way or forego the damages which would accrue to them by reason of the construction of the drain, and thereupon an application was made to the district court for the appointment of special commissioners to determine the necessity for the drain, the necessity for taking private property for the purposes thereof, and the just compensation to be made. After the special commissioners had made their report, a suit was brought to enjoin the drain commissioner from proceeding further. The burden of the complaint is that certain of the plaintiffs own arid lands which require artificial irrigation; that each of them has made an appropriation of water from Allendale or Laurel creek to irrigate his respective tracts of land; and that the drain, if established, will cut off the source of supply of water, and render these several water rights useless. It is also alleged that one of the plaintiffs, Margaret Summers, over whose lands it was sought to lay the drain, was not named in the application of the drain commissioner to the district court. It is also alleged that Margaret Summers is the wife of Elmer G. Summers, that Ida B. Jones is the wife of D. A. Jones, and Clara M. Jones is the wife of William I. Jones, and that each of these women has an inchoate right of dower in the lands of her husband which are sought to be taken for the right of way for the drain, and that they were not named in the application of the drain commissioner. To the

complaint setting forth the facts a demurrer was sustained, and plaintiffs, electing to stand upon their complaint, suffered judgment to be entered against them, from which judgment they appeal.

1. There is not any attack made upon the drainage law nor upon the regularity of the proceedings taken to establish the drain, so far as they went. The contention of the appellants is that the effect of the establishment of this drain will be to take from them their respective water rights, and, since the use of water for irrigation is declared to be a public use, they say that their rights cannot be appropriated except by condemnation proceedings, in which it should be made to appear that the use for drainage is a more necessary public use than the use to which they had theretofore been applied. This argument might be persuasive if it appeared that the object of the proceedings to establish the drain was to acquire or destroy these water rights; but such is not the case. On the contrary, the only purpose of the drainage proceedings, so far as they affect these plaintiffs, is to acquire a right of way for a drain. The legislative authority generally to enact these drainage statutes is derived from the police power, the power of eminent domain, or the taxing power. (*Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677; 10 Am. & Eng. Ency. of Law, 2d ed., 222; 14 Cyc. 1025.) The proceedings under our statute are essentially those of eminent domain, and, if in obtaining a right of way for a drain across the lands of these plaintiffs their lands will be depreciated in value by reason of the impairment of their water rights, this is one of the elements to be considered in assessing damages to them. The proceeding, in principle, is not different from the proceeding to establish a public road; and if, in laying out a public highway across a man's land, his irrigating ditch should be so interrupted as to render his water right of little or no value, this would not of itself give rise to a cause of action for an injunction to prevent the establishment of the highway, but would be an element to be considered in assessing damages to the land owner.

2. In the preliminary portion of his brief counsel for appellants enumerates as one of the questions raised by the appeal the following: "Said proceedings were also irregular, in that Margaret Summers, who is a part owner of one of the water rights in question, and owner of a portion of the lands in question, was given no notice of the proceedings for establishment of said drain, and was not made a party thereto." There does not appear to be any portion of the argument directed to the support of this contention. However, it is alleged that, in the application of the drain commissioner for the appointment of special commissioners, the lands of Margaret Summers were described, but she was not named as an owner of any of the lands. It is true that section 2415 requires that the application shall set forth: "(1) The several descriptions of tracts of land with the names of the owner or owners of every such tract who have refused or neglected to execute a release of right of way and damages in any way arising or incident to the opening or maintaining the said proposed drain." But we can easily conceive of a case where a particular individual might be the owner of certain lands and that fact not appear of record, in which event the drain commissioner might make the mistake of assuming that the land belonged to the holder of the record title. This is said merely to illustrate our idea that the statute does not intend to require the drain commissioner to state the names of the land owners accurately under pain of having the proceedings held void for his failure to do so; and, while the statute is mandatory in form, we do not believe that it was intended to be so far construed mandatory as to render the proceedings void on account of misnaming a party, or a mere failure to give the name of a particular nonconsenting land owner.

The complaint fails to state that Margaret Summers was not a party to the proceedings; that she was not served with citation; that she did not appear and contest the right of the drain commissioner to have the drain established; that the special commissioners did not hear her and assess and award to her adequate damages, and, since she has come into a court of

equity, she must show a clear right to relief, and this she has failed to do.

3. It is also contended that the wife of each of the plaintiffs, Elmer G. Summers, D. A. Jones, and William I. Jones, should have been made a party to the proceedings to secure a right of way for the drain in order to foreclose her right of dower in her husband's real estate so sought to be taken. While there appears to be some conflict of authority upon this question, the better rule, and the one which seems to be supported by the weight of authority, is that it is not necessary to make a married woman having only an inchoate right of dower in her husband's real estate a party to proceedings in condemnation to secure a right of way over such real estate. (Elliott on Roads and Streets, 2d ed., 325; Mills on Eminent Domain, sec. 71; *Venable v. Wabash W. Ry. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; *Flynn v. Flynn*, 171 Mass. 312, 68 Am. St. Rep. 427, 50 N. E. 650, 42 L. R. A. 98; 14 Cyc. 931; 15 Cyc. 840.)

There does not appear to be any error in the record. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

VANCE, RESPONDENT, v. MCGINLEY, APPELLANT.

(No. 2,649.)

(Submitted April 9, 1909. Decided April 24, 1909.)

[101 Pac. 247.]

Associations—Actions—Parties—Erroneous Judgment.

Associations—Actions Against, in President's Name.

1. A voluntary association of laborers cannot, in the absence of statute authorizing it, be sued in the name of its president.

Same—Judgment—Error.

2. *Held*, that a judgment against defendant personally, who was sued as president of a labor organization by a member of it to recover certain pecuniary benefits which he alleged he was entitled to from the association, was not supported by the complaint which neither stated a cause of action against him individually nor in his official capacity.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by J. S. Vance against Hugh McGinley, as president of the International Building Laborers' Protective Union of America No. 1, of Butte City, Montana, a voluntary labor association. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to dismiss the action.

Messrs. Mackel & Meyer, for Appellant.

Mr. Jos. J. McCaffery, and Mr. E. E. Kinerk, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Silver Bow county by J. S. Vance against "Hugh McGinley, as President of the International Building Laborers' Protective Union of America No. 1, of Butte City, Montana, a Labor Association, Defendant." The complaint alleges that, at the time of the filing of the complaint, Hugh McGinley was the president of the union, which is a voluntary association of building laborers; that the plaintiff became a member of the association in October, 1906, and ever since that time has been a member in good standing. It is then alleged that by a certain by-law of the association it is provided that "any member in good standing in this union who is injured while at work shall be entitled to his expenses." It is then alleged that while working upon a certain building in Butte during the month of November, 1906, the plaintiff was seriously injured, and by reason thereof incapacitated from performing work; that his necessary expenses incurred during the time he was so incapacitated amounted to \$295.25; that he presented to the association an itemized account of such expenses, but the association refused to pay the amount or any portion thereof, except the sum of \$25. The prayer is for judgment against the defendant for \$270.25 and costs of

suit. To this complaint there was filed an answer as follows: "Comes now the defendant above named, and for answer to the complaint of plaintiff on file herein says: That he denies each and every allegation in said complaint contained. Wherefore defendant prays judgment against the plaintiff for his costs herein." Upon a trial by the court sitting with a jury, a verdict was returned as follows: "We, the jury in the above-entitled cause, find for the plaintiff the sum of 250.25 dollars." Upon this verdict there was entered a judgment, which, after reciting the proceedings, follows: "Wherefore, by reason of the law, and by reason of the premises aforesaid, it is ordered, and adjudged, and decreed that said plaintiff have and recover from the said defendant the sum of two hundred and fifty 25/100 dollars and costs and disbursements incurred by plaintiff in this action." From the judgment the defendant appeals.

The notice of appeal is directed to the attorneys for plaintiff, and recites that the above-named defendant appeals from the judgment made and entered in favor of the plaintiff and against the defendant. The record on appeal contains only the complaint, answer, instructions, verdict, judgment, notice of appeal, and certificate of the clerk. It is now urged in this court that the complaint does not state facts sufficient to constitute a cause of action against Hugh McGinley individually, or against him as president of the association, and that the complaint will not support the judgment. Counsel for respondent in their brief refer to many matters which are not contained in the record. These we cannot consider. There is not anything in this record to indicate that the association appeared or took part in the proceedings, or that any member of the association was a witness upon the trial. We are bound by the record as it is before us. Counsel for respondent concede that the complaint does not state a cause of action against Hugh McGinley individually, and it certainly does not state a cause of action against him as president of the association. It does not charge that McGinley has done any wrongful act in his capacity as president of the association, or that he has failed to do anything which as president

he ought to have done. In fact, it is not alleged that he was a member of the association at the time the plaintiff was injured, or in fact that he has ever been, or is now, a member. It might be inferred from the allegation that he is president, that he is a member. Apparently the action was commenced and prosecuted upon the theory that by suing McGinley as president of the association, the association itself was sued. At common law such an association could not be sued in its common name, as it did not have any legal entity distinct from that of its members, and therefore all the members had to be made parties to bind the association or its funds. (4 Cyc. 312, 313; 22 Ency. of Pl. & Pr. 242.) Of course, it is elementary that to bind the funds of any individual member of the association such member would have to be made a party to the proceeding. In order, then, to sue an association of this character and not make all the members defendants, we must find some direct statutory authority for such proceeding. Statutes have been enacted in many of our states modifying the common-law rule. In New York, for instance, such an association may be sued in the name of the president or treasurer. (Bliss' New York Annotated Code Civ. Proc. 1902, sec. 1919.) In this state such an association may be sued in the common name (Revised Codes, sec. 6497); but nowhere in our Code is there authority for suing such an association in the name of its president, and, in the absence of a statute authorizing it, a suit cannot be prosecuted in that manner. We need not consider whether an association of this character can be sued by making some of the members, less than all, parties defendant, for the judgment does not purport to be a judgment against the association. It is a judgment against the defendant named; and, since the complaint does not state a cause of action against McGinley personally, or against him as president of the association, it does not support the judgment.

The judgment is reversed and the cause is remanded, with directions to dismiss the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MONSON, RESPONDENT, v. LA FRANCE COPPER CO., APPELLANT.

(No. 2,646.)

(Submitted April 9, 1909. Decided April 24, 1909.)

[101 Pac. 243.]

Master and Servant—Personal Injuries—Safe Appliances—Statutory Provisions—Duty of Master—Proximate Cause—Evidence—Insufficiency—Presumptions.

Master and Servant—Personal Injuries—Safe Appliances—Statutory Provisions—Noncompliance—Liability of Master.

1. Where the legislature has declared that the master shall adopt certain precautions to guard against danger to his employees, the common-law rule of reasonable care is no longer the measure of his duty, and any failure on his part to observe the required precautions is such a breach of duty as will render him liable to the servant for any injury caused to the latter by his disobedience.

Same—Safe Appliances—Legislative Wisdom—Courts may not Question.

2. In the absence of constitutional limitation upon the power of the legislature to declare what precautions the master shall observe, or what appliances he shall adopt, to safeguard the lives and limbs of his employees, its judgment in this regard is binding, and it is beyond the power of the courts to inquire into the wisdom of the legislation.

Same—Nonperformance of Statutory Duty—Burden of Proof—Proximate Cause.

3. In an action to recover damages for the death of an employee, alleged to have been caused through the fault of the employer by reason of his nonperformance of a statutory duty relative to safeguarding appliances, the burden is upon plaintiff to show the causal connection between the negligence as alleged and the injury, i. e., that defendant's negligence in failing to observe the statutory requirement was the proximate cause of the injury.

Same—Nonperformance of Statutory Duty—Proximate Cause—Evidence—Insufficiency.

4. Evidence in an action against a mining company to recover damages for the death of one of its employees, claimed to have been caused through his falling out of a cage while being hoisted out of the mine, because of defendant's negligence in failing to see that the doors with which the cage was provided were in place, as required by section 8536, Revised Codes, *held*, not to show that the alleged negligence was the efficient cause of the death of plaintiff's intestate.

Presumptions.

5. The law presumes that a person takes ordinary care of his own affairs, including his life.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

39	50
39	349
39	50
41	350
41	477
41	504
39	50
40	207
40	523
40	618

ACTION by Sadie A. Monson, as administratrix, against the La France Copper Company and others. From a judgment for plaintiff, and from an order denying defendant Copper Company's motion for new trial, it appeals. Reversed.

Messrs. Gunn & Rasch, and Mr. Chas. B. Leonard, for Appellant.

The evidence fails completely to furnish any light as to the cause of Monson's death or as to the manner in which he was killed. Nor is there anything from which any inference regarding the matter could be legitimately drawn or deduced. The case should not, therefore, have been permitted to go to the jury. (*Olsen v. Mont. Ore. Pur. Co.*, 35 Mont. 400, 89 Pac. 731; 2 Labatt on Master and Servant, sec. 837; *Canadian Colored Cotton Mills Co. v. Kervin*, 29 Can. S. C. 478; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Fitzgerald v. New York Cent. etc. Ry. Co.*, 154 N. Y. 263, 48 N. E. 514; *Deschenes v. Concord & M. R. Co.*, 69 N. H. 285, 46 Atl. 467; *Houston & T. C. R. Co. v. Loeffler* (Tex. Civ. App.), 59 S. W. 558; *Green v. Smith R. Co.*, 5 Am. & Eng. Ann. Cas. 165.)

The deceased assumed the risk. Except for the fact that the duty with reference to the use of doors or gates is a statutory duty as distinguished from a common-law duty, there could be no question but that the deceased assumed the risk and that there would be no right of recovery. (*Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Hardesty v. Largey Lumber Co.*, 34 Mont. 160, 86 Pac. 29; *McAndrews v. Montana etc. Ry. Co.*, 15 Mont. 290, 39 Pac. 85.)

The doctrine of assumption of risk has its foundation in the maxim *Volenti non fit injuria*, expressed in section 6183, Revised Codes, in the words "he who consents to an act is not wronged by it." The principle operates to create exceptions to laws imposing liability where no exception is expressed in the law. It applies independently of any contractual relation. (*O'Malley v. South Boston Gas L. Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L.

R. A. 367; *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 72 C. A. 365, 6 L. R. A., n. s., 981; *Schlemmer v. Buffalo etc. R. R. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Mad River R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Birmingham R. R. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457.)

If this court in the *Coulter Case*, *supra*, when it is said: "The facts in the case as disclosed show that plaintiff knew the danger and assumed the risk. Thereby she made a contract, not against public policy, as appears to us, to assume such risk," intended to decide that assumption of risk by a servant is the result of contract, in the sense that there is an agreement between the master and servant that the servant will assume the risk, it is at once apparent that the court must recede from such holding, in view of the provisions of section 16 of Article XV, Constitution, and sections 5052, 5053, 5243, and 5244, Revised Codes.

The true basis of the defense of assumption of risk being the maxim *Volenti non fit injuria*, it must follow that this defense is available whether the duty, the failure of performance of which creates the risk, is a duty imposed by statute or by the common law. (*Knisley v. Pratt*, *supra*; *Langlois v. Dunn Worsted Mills Co.*, 25 R. I. 645, 57 Atl. 910; *Martin v. Chicago etc. R. R. Co.*, 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698; *Birmingham R. R. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457.)

The deceased was guilty of contributory negligence in not placing the gates on the cage before using the same. That this defense is available where the negligence consists in the failure to perform a statutory duty has been held by this court and by the authorities generally. (*Hunter v. Montana etc. Ry. Co.*, 22 Mont. 525, 57 Pac. 140; *Beghold v. Auto Body Co.*, 149 Mich. 14, 112 N. W. 691, 14 L. R. A., n. s., 609.)

Messrs. Breen & HogevoU, for Respondent.

If the legislature has passed an Act for the purpose of protecting a servant, and made certain provisions in said Act whereby the omission of a certain matter is made a crime, then

and in such event, the assumption of risk does not apply. (*Naramore v. Cleveland C. C. & St. L. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; *St. Louis etc. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Hill v. Saugestad* (Or.), 98 Pac. 524.)

“Contributory negligence is in many cases held to be no defense to an action for the breach of the statute, which amounts to a willful, wanton or intentional wrong.” (Labatt on Master and Servant, sec. 52; *El Paso etc. R. Co. v. Foth*, 45 Tex. Civ. App. 275, 100 S. W. 173.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court:

Action by plaintiff, as administratrix of the estate of John Monson, her deceased husband, for damages on account of his death in the course of his employment as a pumpman by the defendant corporation in one of its mines in Silver Bow county.

In the complaint F. Augustus Heinze, the manager of the corporation, William A. Kidney, the superintendent of the mine, and Albert Frank, employed as mining engineer, are joined with the corporation as defendants. Defendant Heinze was never served with summons. During the trial the action was dismissed as to defendants Frank and Kidney, and thereafter it proceeded against the corporation alone. As to this defendant, it is alleged that at the time of the death of plaintiff's intestate it was engaged in operating the Lexington mine in Silver Bow county; that there is a vertical shaft in said mine to the depth of fourteen hundred feet, in which cages were used for the purpose of lowering and hoisting the employees; that it was the duty of the defendant to provide these cages with doors to prevent the employees from slipping or falling therefrom while they were being lowered or hoisted; and that the defendant failed to perform this duty, with the result that the deceased, while riding in one of the cages in pursuit of his duties as pumpman under the direction of the defendant, fell from it and was

killed, to the damage of plaintiff in the sum of \$25,000. Judgment is demanded for this amount.

The answer, admitting that the defendant was engaged in operating the mine, that there is a vertical shaft therein as alleged, and that the deceased was in its employ at the time of his death, denies generally all the other allegations contained in the complaint. It also alleges affirmatively contributory negligence on the part of the deceased, Monson, and that the risk incident to the use of the cages as alleged was assumed by him. Upon these allegations there was issue by reply. At the close of plaintiff's case in chief defendant moved for a nonsuit, on the ground, among others, that the evidence did not show what was the cause of Monson's death. The motion was denied. When the hearing of the evidence was concluded, motion was made by defendant for a directed verdict. This motion was also denied. The plaintiff had verdict and judgment for \$4,000. The defendant has appealed from the judgment and an order denying it a new trial.

The following is a full statement of the evidence submitted to the jury: On January 26, 1908, the defendant was operating the Lexington mine at Butte. The working shaft, fourteen hundred feet in depth, is vertical and has three compartments. One of these is used for pumps. The other two are provided with double-decked cages for lowering and hoisting men and materials. The timbering is constructed in the usual way, in sets, consisting of horizontal wall plates and upright corner pieces of twelve by twelve lumber; the lagging being of two-inch planks. The spaces between the plate timbers, or dividers as the witness designated them, separating the compartments are open, except that in the working compartments there are upright pieces at each end in the middle, to which are nailed guides for the cages. The sets are about five feet in height. It does not appear definitely what the dimensions of the different compartments are, but the working compartments are of sufficient size to permit the use of cages having doorways in the side, of forty-one inches, and to allow a space of two or three inches

for the cages to clear the wall plates and foot sills at the various levels. Including this space, the horizontal distance from the cages to the lagging, when moving between the wall plates, is fourteen or fifteen inches. This leaves openings at the sides of the cages, as they pass from plate to plate, of forty-one inches in length by fourteen or fifteen inches in width, being sufficient in dimensions to permit a man to slip or fall out. Just here it may be stated that, to guard against this danger, cages used in vertical shafts of a greater depth than three hundred feet, or not exclusively for sinking, are required by statute (section 8536, Revised Codes) to be cased in on three sides with sheet iron or steel not less than one-eighth of an inch in thickness, and on the fourth side to be provided with doors or gates of the same material, hung on hinges or adjusted to slide. They are also required to be covered by a substantial iron or steel bonnet, to furnish protection against anything falling from above. The cages in use by the defendant at the time of Monson's death were so constructed as to meet the requirements of the statute as to bonnet and sheathing. The doors were hung on hinges, and so adjusted that, when the cages were not in actual use for lowering and hoisting men during the changes of shifts, they could readily be taken off and set aside, and this was done whenever the cages were used in hoisting ore or waste or lowering timbers and other material. Each cage was also furnished on each deck with a handbar, which passes across it overhead. This was used as a handhold by the miners while the cage was in motion. The company usually had an employee, called a "top-man," whose duty it was to put the doors on when a cage was in use by the men, and also to see that they were securely latched or locked before the cage was moved. At each station where men got on and off there was a station tender to open and close the doors. The superintendent, the engineers, and foremen, when engaged in inspection or similar duties, commonly used the cages without the doors or other device for protection, depending for safety on the handbar alone. The same course was pursued by the timbermen when they would be engaged in lower-

ing timbers. The deceased was working on night shift. One pump was installed at the station at the fourteen hundred foot level. This was used to raise the water up to the six hundred foot level to a tank installed there; thence it was pumped to the surface by a second pump, which was operated from that station. These two pumps were kept at work alternately, each for four hours during the shift. The deceased went on shift at 11 o'clock in the evening. After changing his clothes in the dry-room, he asked the engineer in charge of the hoist to lower him to the fourteen hundred foot level. Neither the topman nor the station-tender was usually on duty at that hour. Neither was on duty at this time. The pumpmen were expected to put the doors on a cage when they wished to use it. Usually they omitted to do this, relying for protection on the handbar. The deceased never stopped to put them on even when he took the plaintiff or her friends with him to visit the mine, which he frequently did. He did not put them on at this time. After starting to get into the cage on this evening, he turned back and handed the engineer \$15 in bills, saying: "Here is \$15. You can keep it for me." Then, upon turning away, he looked back, saying: "I don't care whether you blow it in or not. I might not need it again." The witness stated that other employees at the mine had at other times left their money with him because there was danger of getting it wet while at work. He thought deceased was joking when he made the last remark. At this time the face of deceased appeared unusually pale. He used the upper deck of the cage. There is nothing in the record to show what he did after the engineer let him off at the lower pumping station, until some time after 2 o'clock the next morning. In the meantime the cage had been brought to the surface, but had not been used, nor had the doors been put on. Upon a signal from the fourteen hundred foot level, the engineer returned the cage. Immediately afterward he received a signal to hoist to the six hundred foot level. This he did, setting the upper deck at the station. He observed no jar or irregularity in the movement of the

cage during its ascent; it being, as he stated, so heavy that impact against some solid body was necessary to produce a perceptible jar while it was in motion. The cage not being released as the engineer expected, he feared that something was wrong; so he requested two miners who had just come to the surface by the other working compartment to make an inspection. They took the cage by which they had been hoisted and descended to the six hundred foot level, where they found the other cage standing as the engineer had placed it. Searching as they descended from that level, they finally found Monson's body at a point about sixty feet from the fourteen hundred foot level, stretched across the compartment through which he had been sent down, his head and shoulders resting on one of the dividers on one side, and his feet in the same position on the opposite side, while the hips were resting on or against one of the wall plates. Its position was such that a cage could not pass it. To use the language of one of the witnesses who found the body: "I don't see what was holding him. He was swinging right across the shaft." The face was bruised and cut, but there were no broken bones and no evidence of any other wound. No blood was found except upon the divider, upon which his head rested. The lunch basket of the deceased was found in the cage. There is no evidence whether any cut or bruise upon the face was mortal. During the early evening, before Monson went to work, he attended the theater with plaintiff. While there he remarked twice to plaintiff that he could hear water "rolling." She attached no significance to these remarks, explaining that she also heard a noise, but did not know whether it was on the stage or caused by the cars on the street. Monson had been hurt at this mine some months before. As a result he had grown nervous, and after his recovery entertained a dread of the mine. Upon returning from the theater he had lunch with plaintiff, and, to use her language, "seemed all right." He had been spitting blood during the day; this trouble being occasional and apparently the result of his previous hurt. On parting with plaintiff he gave her \$40, all the money he had, except \$15 which

he retained, saying he intended to lend it to a friend at the mine. She tried to induce him not to go to the mine that night. He usually gave his pay checks to plaintiff. He was a large man, weighing one hundred and seventy-five or one hundred and eighty pounds, and was apparently strong and healthy.

The first contention made is that the evidence is not sufficient to warrant a submission of the case to the jury. It is said that the evidence does not show, or tend to show, that the death of Monson was caused by the failure of defendant to see that a door was on the cage at the time Monson was lowered, and then afterward supposedly raised from the fourteen hundred foot level; in other words, while it may be conceded that the evidence is sufficient to establish negligence on the part of the defendant in failing to see that a door was attached to the cage at the time it was used by Monson, there is no evidence showing any causal connection between this negligence and the death itself.

The statute declares: "It is unlawful for any corporation [or person] to sink or work, through any vertical shaft where mining cages are used, to a greater depth than three hundred feet, unless said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employees thereof, said cage to be also provided with sheet iron or steel casing not less than one-eighth inch in diameter; doors to be made of the same material shall be hung on hinges, or may be made to slide, and shall not be less than five feet high from the bottom of the cage, and said door must be closed when lowering or hoisting the men. *Provided*, that when such cage is used for sinking only, it need not be equipped with such doors as are hereinbefore provided for. The safety apparatus, whether consisting of eccentrics, springs or other device, must be securely fastened to the cage, and must be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet of the aforesaid cage must be made of boiler sheet iron, of good quality, of at least three-sixteenths of an inch in thickness, and must cover the top of such cage in such manner as to afford the greatest protection to life and limb from

anything falling down said shaft. It shall be the duty of the mining inspector and his assistant to see that all cages are kept in compliance with this section and to also see that the safety dogs are kept in good order. Every person or corporation failing to comply with any of the provisions of this section is punishable by a fine of not less than three hundred dollars, nor more than one thousand dollars." (Revised Codes, sec. 8536.)

Section 705 of the Penal Code of 1895 declared that mining cages, subject to the provisos mentioned, should be protected by an iron bonnet. This was amended by the Act of 1897 (Laws 1897, p. 245), which went a step further, and declared that, subject to the same provisos, they should also be sheathed in with sheet iron or steel casing or wire netting of a prescribed strength, and should be provided with doors of the same material hung on hinges or adjusted to slide. The Act of 1903 (Laws 1903, p. 125), now the section of the Code above quoted, amended this provision by requiring the casing to be of sheet iron or steel. From this provision, as enacted, the words "or person" were omitted by the commissioner in the revision of the Codes, evidently through inadvertence, and should be inserted in the text as it now stands. In *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854, this court sustained the Code provision as amended by the Act of 1897 as a proper exercise of police power by the state; its manifest design being "to guard against the dangers incident to lowering and elevating men in deep mining shafts."

In the absence of legislation touching the duties of the master, his obligations toward his servant are defined by the rules of the common law, and extend no further than to require him to exercise ordinary care to furnish the servant with reasonably safe and suitable appliances for his use in the performance of his work, reasonably competent fellow-servants, and a reasonably safe place in which to work. (*Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131.) While a correspondingly greater measure of care is always required whenever the hazard is greater, the exercise of ordinary care, as this expression must

be interpreted in the light of the circumstances of each case, always discharges the master from liability. Even when he has been guilty of a failure in his duty, there must always be shown a casual relation between his fault and any injury for which it is sought to hold him liable. He may be held responsible only when to his lapse of duty is directly attributable the wrong complained of, as any given effect may be attributed or assigned to its efficient cause. When the state has, as in the statute, *supra*, declared that the master shall adopt certain specified precautions, the rule of reasonable care is no longer the measure of duty. The necessity for his compliance with the command of the legislature becomes imperative, and any failure on his part to observe the required precautions or to provide the prescribed appliances is such a breach of duty as will render him liable for any injury caused by his disobedience. Mr. Labatt in his work on Master and Servant, after referring to the fact that many courts hold such disobedience negligence *per se*, while others hold it to be merely evidence of culpability, says: "That the former of these theories is the correct one can scarcely be doubted. A doctrine the essential effect of which is that the quality of an act which the legislature has prescribed or forbidden becomes an open question upon which juries are entitled to express an opinion would seem to be highly anomalous. The command or prohibition of a permanent body which represents an entire community ought in any reasonable view be regarded as equivalent to a final judgment upon the subject matter which renders it both unnecessary and improper that this question should be submitted to a jury." (2 Labatt on Master and Servant, sec. 799.) As was pointed out by Mr. Justice Hunt in *State v. Anaconda Copper Min. Co.*, *supra*, so long as there is no constitutional limitation upon the power of the legislature to declare the rule of duty, its judgment is binding, and it is beyond the power of the courts to inquire whether the particular precaution or appliance required is the best or wisest. In *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140, this court, following the weight of authority, held that a railroad

company whose employees in charge of a train failed upon approaching the crossing of a highway to observe the precautions required by a statute for the protection of the public (Civil Code 1895, sec. 908 [Revised Codes, sec. 4289]) was chargeable with negligence. There can be no distinction between the effect of a statute designed to protect the public generally at railroad crossings and one designed to secure safety to servants engaged in hazardous employments. Whether the violation of such a statute is properly designated as negligence or not, the master is responsible for his failure to observe it. But it does not follow that he may be held to respond in damages for an injury not shown to have been the proximate result of his disobedience. As in cases where the rule of ordinary care applies, the plaintiff must prove, not only the injury, but also that it was proximately caused by the negligence alleged (*Pierce v. Great Falls & Canada Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Shaw v. New Year Gold Min. Co.*, 31 Mont. 138, 77 Pac. 515; 1 Thompson on Negligence, sec. 45; 2 Labatt on Master and Servant, sec. 803), so in cases where it is sought to hold the master for non-performance of a statutory duty the evidence must tend directly to show that the fault was the cause of the injury. And, as Mr. Labatt observes: "The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken. The master cannot be held liable if his negligence was merely a condition as opposed to the efficient cause of the injury." (Vol. 2, sec. 803.) The burden is always upon the plaintiff in such cases to show the causal relation between the negligence and the injury. The efficient cause may be shown by indirect evidence, but even in a civil case a theory cannot be said to be established by such evidence, unless the circumstances are such, not only that they furnish support for the particular theory, but also tend to exclude any other reasonable theory. (*Shaw v. New Year Gold Min. Co.*, *supra*.)

Analyzing the facts shown by the evidence before us, and testing it by these rules, we find the neglect of duty on the part of the defendant and the death of the deceased established beyond question; for assuming, without deciding, that the requirements of the statute were met by the defendant by providing doors such as are shown to have been in use at the time of Monson's death, the duty to see that they were in place at any time when the cages were used to lower or hoist employees was a continuing one, which could not be delegated. But no fact or circumstance appears from which any reasonable conclusion may be drawn that this neglect of duty bears a direct proximate causal relation to the death of deceased. There is no direct evidence that the deceased got into the cage at the fourteen hundred foot level; but, assuming that this fact is established by the statement of the engineer that he set the cage at that station in reply to a call from the deceased, that the lunch basket of the deceased was found in the cage, and that his body was found, as it was, about sixty feet above the fourteen hundred foot level, there is no evidence as to how the deceased got out of the cage, or whether he died from a sudden stroke of disease, and then fell to the position in which his body was found, or died after he got out of the cage, having fallen out by reason of such a sudden stroke. There is nothing to show whether he died from natural causes or from the violence of a fall, or from being squeezed by the cage as it passed the timbers. Indeed, it does not appear, even by remote inference, that he fell any distance. The cuts and bruises on the face do not appear to have been mortal. The fact that they were there and that there was blood on the timber is as consistent with the idea that the deceased died a natural death as with the idea that he was killed by being caught between the cage and the timbers or by a fall. Very little additional evidence tending to show death by violence would have been sufficient to distinguish the case from *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40, *McAuley v. Casualty Co.*, 37 Mont. 256, 96 Pac. 131, and *Olsen v. Montana Ore. Pur. Co.*, 35 Mont. 400, 89 Pac. 731; but, as it stands, it must be held to fall within the principle

of all of them. Any other conclusion upon such evidence would be a determination of the rights of the parties upon speculative and conjectural inferences, which is not permissible. The case is distinguishable from *Hollingsworth v. Davis-Daly Estates Copper Min. Co.*, 38 Mont. 143, 99 Pac. 142, in that the facts and circumstances surrounding the death of Hollingsworth tended to show that the efficient cause of it was the fall into the shaft which had been left in a dangerous condition by the defendant in a place where the employees were expected to go in pursuit of their employment. In that case the conclusion seemed inevitable that the negligence of the defendant caused the injury. Here such a conclusion would be a mere guess.

We have not noticed in this discussion a contention incidentally made by defendant's counsel, that the evidence tends to show that deceased committed suicide. We do not think the peculiarities of his conduct during the evening, in view of the explanations given by the witnesses, would justify any such conclusion. especially so in view of the presumption which the law indulges that a person takes ordinary care of his own concerns, including his life.

The court was in error in denying the motion for nonsuit. This conclusion renders it unnecessary to consider other grounds of the motion or alleged errors based upon the refusal of the court to submit certain instructions. The judgment and order are reversed.

Reversed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

**QUONG WING, RESPONDENT, v. KIRKENDALL, COUNTY
TREASURER, APPELLANT.**

(No. 2,656.)

(Submitted April 10, 1909. Decided April 24, 1909.)

[101 Pac. 250.]

***Constitutional Law—Occupation License Fees—Laundries—
Equal Protection of Laws—Statutes—Burden of Proof—Pre-
sumptions.***

Statutes—Constitutionality.

1. A statute may not be declared unconstitutional unless it is clearly so.

Same—Occupation Tax—Constitutionality—Burden of Proof—Presumptions.

2. The burden of showing that a statute imposing a license tax is unconstitutional as denying the equal protection of the laws, in that the classification therein made is arbitrary, unreasonable or unjust, rests upon plaintiff. The presumption obtains that the legislature in enacting it exercised reasonable discretion in making the classification.

Same—Laundries—Statutes—Constitutionality.

3. Assuming that section 2776, Revised Codes, providing that every person engaged in the laundry business, other than steam laundry business, shall pay a license fee of \$10 per quarter, etc., classifies laundries for license purposes [which is doubted], into steam laundries and laundries operated by hand, such classification held not arbitrary or unwarrantable.

Same—Occupation Tax—Equal Protection of Laws.

4. The legislature is not required to tax all occupations equally or uniformly; hence it had power to single out proprietors of hand laundries and compel them to pay a license; and so long as the law was uniform as to all persons operating such laundries, there was no denial of the equal protection of the laws.

Same—Laundries—Discrimination.

5. Section 2776, Revised Codes, imposing a license fee of \$10 per quarter upon every person engaged in the laundry business, other than steam laundries, is not unconstitutional because it exempts from its operation women engaged in such business, provided not more than two are employed or kept at work.

***Appeal from District Court, Lewis and Clark County; Thos.
C. Bach, Judge.***

ACTION by Quong Wing against Thomas B. Kirkendall, county treasurer, to recover a license fee paid. From a judgment for plaintiff, defendant appeals. Reversed.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Appellant.

The legislature is not restricted by the Constitution, and therefore has full authority to impose a license tax either for regulation or for revenue, and the money received may be divided between the state and the counties. (*State v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095; 25 Cyc. 599, 603; *In re Lipschitz* (N. D.), 95 N. W. 154; *Cooley on Taxation*, 3d ed., p. 1135.)

"The question of classification of objects upon which a license fee is imposed is purely legislative, and in the absence of abuse will not be interfered with by the court." (*State v. McKinney, supra*; 25 Cyc. 606; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Garfinkle v. Sullivan*, 37 Wash. 650, 80 Pac. 188; *In re Watson*, 17 S. D. 486, 97 N. W. 463.)

Messrs. Wight & Pew, for Respondent.

A classification for any purpose must be reasonable and must bear some well-defined relation to the purpose of the law. (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Gulf Ry. Co. v. Ellis*, 165 U. S. 155, 17 Sup. Ct. 255, 41 L. Ed. 666; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833; see, also, *City of Billings v. Cook*, 35 Mont. 95, 119 Am. St. Rep. 845, 88 Pac. 656.)

Section 2776, Revised Codes, attempts a classification which is arbitrary as well as unjust. (*State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959, 56 L. R. A. 570; *Ex parte Jentsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500; *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369; *State ex rel. Chapel v. Justus*,

90 Minn. 474, 97 N. W. 124; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; *Brown & Allen v. Jacobs Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 548; *Magoun v. Illinois Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Standard Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377.) In *Montgomery v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43, 38 South. 67, 70 L. R. A. 209, an ordinance imposing a license on merchants using trading stamps was held void. In *State ex rel, Wyatt v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627, 48 L. R. A. 265, a law fixing a discriminative license tax upon department stores was held unconstitutional. (See, also, *In re Abel*, 10 Idaho, 288, 77 Pac. 621; *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *City of Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. Rep. 885, 55 S. E. 136.)

Section 8602, Revised Codes, provides that any person doing business without a license where a license is required by law is guilty of a misdemeanor. The penalty for misdemeanor is not to exceed six months in jail or a fine of not more than \$500, or both. (Sec. 8111.) A penal statute is to be strictly construed, and this act comes within that rule. "A revenue law requiring peddlers to obtain a license, being penal in so far as it imposes a penalty for a violation of its provisions, must be strictly construed." (*Kloss v. Commonwealth*, 103 Va. 864, 49 S. E. 655.)

MR. JUSTICE SMITH delivered the opinion of the court.

Plaintiff brought this action in the district court of Lewis and Clark county to recover the sum of \$10, which was exacted of him by the defendant as treasurer of that county. The complaint alleges: That plaintiff is engaged in what may be termed the hand laundry business; that there are steam laundries in operation in the county, the proprietors of which are not required to pay a license; that there is no difference between the plaintiff's business and that of a steam laundry, "except that the plaintiff employs different agencies in the said business; that is to say, this plaintiff uses only hand power for

the propulSION and operation of the implements and appliances used in his business, while said (other) persons use steam power * * * and employ both males and females in said laundry business"; that in addition to the steam laundries there are women engaged in the laundry business in the county "where not more than two women are engaged or employed or kept at work," which business is the same as that of the plaintiff; that said women are not required to pay any money for the privilege of carrying on said business; that said license was demanded by the defendant treasurer by virtue of section 2776, Revised Codes, and was collected solely for the purpose of defraying the general governmental expenses of Lewis and Clark county and the state of Montana; that section 2776, Revised Codes, is the only law on the statute books requiring the payment of a license for the privilege of conducting the laundry business. The section referred to reads as follows: "Every person engaged in laundry business, other than the steam laundry business shall pay a license of Ten Dollars per quarter, *provided* that this Act shall not apply to the women engaged in the laundry business, where not more than two women are engaged or employed or kept at work, and said license shall be for one place of business only." The district court overruled a general demurrer to the complaint, and afterward, in default of an answer, entered judgment in favor of the plaintiff. From that judgment the defendant treasurer has appealed. It is claimed by the plaintiff that he is denied the equal protection of the laws guaranteed him by the Constitution of the United States.

1. Let us first assume, for the purposes of this inquiry, without deciding, that section 2776 classifies those engaged in the laundry business. This question was expressly reserved in *State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415. We assume, also, that this license tax is imposed for the sole purpose of raising revenue for general governmental purposes. It is so alleged in the complaint, and the court had little doubt of the fact when the opinion in *State ex rel. Sam Toi v. French*, *supra*, was prepared, under a somewhat similar statute.

We may not declare this Act unconstitutional unless it is clearly so. (*State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635; *State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940.) The legislature is presumed to have exercised a reasonable discretion in making the classification, and the courts ought not to interfere with the action of this co-ordinate branch of the government, until the plaintiff, upon whom rests the burden of proof, clearly shows that he is denied the equal protection of the laws. (*State v. McKinney*, 29 Mont. 375, 74 Pac. 1095.) Every intendment is in favor of the validity of the legislative action. In other words, the classification is presumed to be reasonable. (See *City of Fayetteville v. Carter*, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. Rep. 85, and *Littlefield v. State*, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724, 28 L. R. A. 588, where somewhat analogous presumptions were considered.) If on the face of the measure the classification appears to be arbitrary and unreasonable, or unjust, or no classification at all, a different question is presented. Even assuming that section 2776, Revised Codes, classifies laundries, we are not disposed to hold that the classification made is manifestly arbitrary or unreasonable. It certainly is not obviously so on the face of it. If such classification is made, then steam laundries are placed in one class and hand laundries in another. We do not regard the exemption of women from the operation of the statute, in certain cases, as amounting to a classification, for the reasons hereinafter stated. The fact that both steam laundries and hand laundries obtain the same results is not controlling. For aught we know there may be good and sufficient reasons for believing that the difference between the two classes, based upon the power employed in conducting the business, is fundamental and all-pervading. We cannot say that this classification is any more arbitrary or unwarrantable than would be a division of gas-lighting plants and electric-lighting plants into two classes. Assuming that it might appear to the members of this court that steam laundries should pay a larger

license fee than hand laundries, would the court be justified in declaring a statute unconstitutional which exacted the same fee from both? Or suppose the matter were reversed, and the legislature should provide that only steam laundries must pay a license, could it then be successfully contended that persons engaged in that business were discriminated against and denied the equal protection of the laws? We do not think so. The legislature probably had some good reason for exempting steam laundry proprietors from the payment of license, either permanently, or for the time being. In the case of *East St. Louis v. Wehrung*, 46 Ill. 392, it was held that an ordinance which did not "discriminate as between persons having equal facilities for profit" was not objectionable. (See, also, *Tulloss v. City of Sedan*, 31 Kan. 165, 1 Pac. 285; *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625.) The supreme court of the United States, in *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, said: "There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities; and necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." (See, also, *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569.)

But we doubt whether this statute attempts to classify laundries. The Constitution gives the power to impose a license tax upon persons doing business in this state. (Section 1, Article XII, Constitution.) The legislature is not required to tax all occupations equally or uniformly. (*State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.) Therefore, it appears to follow that the legislature has power to single out the proprietors of hand laundries and compel them to pay a license, and if such license falls upon all hand laundry proprietors alike, no one of them is aggrieved. No suggestion is made that this law is not uniform as to all hand laundry proprietors, either on its face or in its application, except in so far as it exempts certain women, and in all other respects it

appears to us to be uniform and reasonable. "If the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law 'operates equally and uniformly upon all persons in similar circumstances.' " (*Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.) The supreme court of Louisiana, in *Kaliski v. Grady*, 25 La. Ann. 576, said: "It is contended that the (law) is unconstitutional because it levies a tax of \$85 on persons dealing in distilled liquor or retailing spirituous liquors on land, while a tax of only \$50 is levied on persons following a like occupation on steamboats, although they may only ply within the limits of a single parish of the state. We fail to see the force of this proposition. The same amount of tax is levied upon all persons pursuing a certain traffic in a certain way, and we do not see how there can be any unjust discrimination in this."

2. It is contended that the law is invalid because one or two women engaged in the laundry business are not required to pay a license. This provision furnishes no just cause for complaint on the part of the plaintiff. We all know that in every community are to be found women, who, through misfortune, are obliged, as the common expression is, to take in washing for a living. Some are widows, some have been abandoned, others are caring for invalid husbands, and all, generally, have small children to support. Probably a bare living is all that is gained by them. Such women do not compete with those laundries which are operated for profit, any more than do those who, from necessity or choice, perform the laundry work for one private family. They are not to be classed with men who are engaged in the business of conducting public laundries. The legislature in its wisdom has seen fit to say to them: "So long as you do not compete with the public laundries, you need pay no license; but in case you manifest an intention to enter into competition by employing additional help, you must thereafter pay the same fee as do men who are likewise engaged." In thus enacting, the legislature but followed the natural dictates of humanity,

and seems to have been actuated by sentiments altogether praiseworthy and commendable.

Mr. Justice Brewer, of the supreme court of the United States, has said this: "History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened, and her opportunities for acquiring knowledge are great, yet even with that, and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to pro-

fect her from the greed as well as the passion of men. * * * Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her." (*Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551.) On such high authority we are content to rest our opinion on this branch of the case.

The judgment of the district court of Lewis and Clark county is reversed, and the cause is remanded, with directions to vacate the order overruling the defendant's demurrer to the complaint, and to enter, in lieu thereof, an order sustaining the same.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied, May 22, 1909.

Appeal taken to supreme court of the United States, August 21, 1909.

AVERY, RESPONDENT, v. WALL, APPELLANT.

(No. 2,654.)

(Submitted April 10, 1909. Decided April 24, 1909.)

[101 Pac. 249.]

Sales—Pleading and Proof—Variance.

1. The complaint alleged that plaintiff had sold and delivered to defendant 2,000 shares of the capital stock of a mining company for a named sum. The proof showed that a block of 9,500 shares, including that of plaintiff and others, had been placed in the hands of one R. for sale and sold to defendant, but that plaintiff's stock had been returned by the latter to R. with the request to hold it for him (defendant) for a short time, when he would take the stock and pay for it, which he failed to do. *Held*, that by returning plaintiff's stock to R. there was such a severance from the block sold to defendant in the first instance, as to permit plaintiff to recover on the promise of defendant to pay for it, and that the claim that there was a variance between the allegations of the complaint and the proof had no merit.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by A. W. Avery against Patrick Wall. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Mr. M. S. Gunn, Mr. Chas. R. Leonard, and Messrs. Lamb & Walker, for Appellant.

Where the complaint alleges an indebtedness for stock sold by the plaintiff to a defendant, and the evidence shows the stock was sold by plaintiff and others to the defendant, such proof does not authorize a judgment for plaintiff against such defendant, since it does not support the cause of action set up by the plaintiff. An allegation that a contract was made with five, who are plaintiffs, is not supported by proof of a contract made with three, and the variance is fatal as a ground of nonsuit. (*Murray v. Davis*, 51 N. C. 341; 9 Cyc. 748, 750, 751.) A plaintiff can recover only on a cause of action alleged and proved. (*Latrobe Steel etc. Co. v. Shlones*,

129 Ill. App. 215; *Henry County v. Citizens' Bank*, 208 Mo. 209, 106 S. W. 622, 14 L. R. A., n. s., 1052; *Henry County v. Farmers' Bank*, 208 Mo. 238, 106 S. W. 630; *Epstein v. Cohen*, 56 Misc. Rep. 579, 107 N. Y. Supp. 148; *Abromovitz v. Markowitz*, 58 Misc. Rep. 231, 108 N. Y. Supp. 1044.) Facts proven, but not alleged, cannot form the basis of recovery. (*Smith v. First Nat. Bank*, 43 Tex. Civ. App. 495, 95 S. W. 1111.) There can be no recovery on a cause of action, however meritorious, or however satisfactorily proven, if it is in substance variant from that pleaded by the plaintiff. (*Louisville Ry. v. Guyton*, 47 Fla. 188, 36 South. 84; *Hinote v. Brigman*, 44 Fla. 589, 33 South. 303.) A party cannot sue upon one cause of action and recover on another. (*York v. Farmers' Bank*, 105 Mo. App. 127, 79 S. W. 968.) A judgment based on evidence not admissible under pleadings is erroneous. (*Western Union Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40.)

Messrs. McBride & McBride, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action alleges that on or about January 1, 1907, the plaintiff sold and delivered to Patrick Wall, the defendant, 2,000 shares of the capital stock of the Butte Milling Company for the agreed price of \$2,000, which sum the defendant promised to pay, but has failed to do so. The answer admits that no part of the purchase price has been paid, and denies each and every other allegation of the complaint. The trial resulted in a verdict in favor of the plaintiff, and from the judgment entered upon the verdict, and from an order denying him a new trial, the defendant appeals.

The specifications of error relate to the action of the court in (1) denying defendant's motion for a new trial; (2) giving instruction No. 4; (3) refusing defendant a new trial; and (4) rendering judgment in favor of the plaintiff. In their brief

counsel for appellant say: "The above specifications of error will all be considered together, as they are all predicated upon a violation of the same proposition of law, namely: That in order to enable a plaintiff to recover, or a defendant to succeed in his defense, what is proved or that of which proof is offered by the party on whom lies the *onus probandi* must not vary from what he has previously alleged in his pleading. (22 Ency. of Pl. & Pr. 527.) The appellant contends that this rule of law has been violated in this case in the particulars pointed out in the specifications of error in *this*: That the plaintiff in his complaint alleges as the basis of his cause of action a contract made and entered into between the defendant and himself; whereas his proof shows another and different contract between himself, Judge Brantly, John, Nesbit, and Albert Rochester, and Messrs. Manuel and Tuscherer, as parties of one part, and the defendant, as the party of the other part."

The evidence discloses that the Rochester brothers had induced certain of their friends to purchase shares of stock in the Butte Milling Company; that dissatisfaction arose over the management of the company's property; that the Rochester brothers desired to dispose of their stock, and also desired to assist their friends in disposing of the stock belonging to them. It appears that Nesbit Rochester, John Rochester, and Albert Rochester each owned 2,000 shares, Avery 2,000 shares, Manuel 500 shares, Tuscherer 500 shares, and Judge Brantly 500 shares; that Nesbit and John Rochester, acting for themselves and as agents for the others, sold the 9,500 shares mentioned above to Wall; that Tuscherer concluded to retain his stock, and it was returned to him; that the certificates representing the other 9,000 shares, including the 2,000 belonging to Avery, were delivered by John Rochester to Wall; that Wall first paid \$6,000 on the purchase price, and a few days later paid another \$1,000. and then returned to Rochester the certificate representing the 2,000 shares belonging to Avery, and requested Rochester to hold the same for him (Wall) for a few days until he could get the balance of the money, and he would then take the stock;

that Rochester kept the certificate for Wall, who neglected to pay for the same.

While the evidence shows a sale in the first instance of a block of 9,500 shares of the stock, it also shows a modification of that contract. Tuscherer's stock was withdrawn, and after there had been a delivery of Avery's stock it was placed with John Rochester to be kept for Wall, under an agreement that Wall would take that particular stock and pay for it in a few days. By this agreement there would seem to have been such a severance of Avery's stock from the other stock as to permit him to recover on the promise of Wall to pay for his particular stock. When the Avery stock was returned to Rochester it was held for Wall, and in contemplation of law was still in the possession of Wall, and his receipt of the stock, coupled with his promise to pay for it, constituted the contract for the breach of which Avery has sued. The evidence shows that Avery did not have any interest in any of the other stock sold; nor had anyone else any interest in his stock. The contention of the appellant, as stated above, does not seem to be well founded.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH concurs.

MR. CHIEF JUSTICE BRANTLY, being disqualified, takes no part in the foregoing decision.

JENKINS, APPELLANT, v. NEWMAN ET AL., RESPONDENTS.

(No. 2,701.)

(Submitted May 3, 1909. Decided May 4, 1909.)

[101 Pac. 625.]

***Counties—Indebtedness—Constitutional Limitation—"Bridge"
—What Constitutes—Agreed Statement of Facts—Effect.*****Counties—Constitution—Indebtedness—Items not to be Considered.**

1. The mileage and *per diem* of county commissioners charged to their county on account of trips made to the site of a bridge, and expenses incurred for services of the county surveyor in surveying and locating the site, are not proper items to be taken into consideration in arriving at the amount of indebtedness (\$10,000) which could lawfully be incurred by the county, under section 5, Article XIII, of the Constitution, on account of the construction of the bridge, without first obtaining the approval of a majority of the electors of the county.

Same—Indebtedness—Constitutional Limit—Items to be Considered.

2. Where it becomes necessary to employ inspectors, other than county officers, in the construction of a bridge, the sums so expended must be regarded as a part of the aggregate cost of the project in arriving at the amount county commissioners may disburse without consulting the electors of their county.

Agreed Statement of Facts—Effect.

3. An agreed statement of facts upon which a cause was tried is of the same effect as a special verdict or finding of facts.

Counties—Indebtedness—"Bridge"—What Constitutes—Void Contract.

4. The commissioners of two counties entered into a contract for the construction of a bridge over a river separating them. The contract price was \$19,998, and each county became obligated in the sum of \$9,999. Without proper approaches, the cost of which would approximate \$300, the bridge was useless, but the contract did not make any provision for them. Section 5, Article XIII, of the Constitution, declares that no county shall incur any indebtedness, for any single purpose, to an amount exceeding \$10,000, without first obtaining the consent of a majority of the electors of the county. Under section 1416, Revised Codes, the word "bridge" includes the approaches thereto. *Held*, that the single purpose sought to be accomplished by the commissioners was the building of a bridge, with approaches thereto, and that, since that purpose could not be consummated without exceeding the constitutional limitation, the contract was void.

Appeal from District Court, Yellowstone County, Sydney Fox, Judge.

ACTION by William D. Jenkins against C. H. Newman and others, as commissioners of Carbon and Yellowstone counties, to restrain said defendants from carrying out the terms of a cer-

tain contract. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Messrs. Miller & O'Connor, and George H. Simpson, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

On the ninth day of November, 1908, the boards of county commissioners of Yellowstone and Carbon counties entered into a written contract with William S. Hewett and Arthur L. Hewett, copartners doing business as the Security Bridge Company, for the construction of a bridge across the Yellowstone river to connect the two counties. This action was brought by the plaintiff, a taxpayer in both counties, to restrain the defendants from carrying out the terms of said contract, and to enjoin the county commissioners "from allowing any bill or ordering any county warrant to be drawn for or on account of any matter or thing arising from or growing out of said contract." The cause was tried on an agreed statement of facts to the district court of Yellowstone county, sitting without a jury. That court adjudged the contract to be "a valid and subsisting obligation," and refused the injunction. From such judgment plaintiff has appealed.

It appears that the contract price of the bridge was \$19,998, and it was assumed by counsel at the argument that each county became obligated in one-half of that sum, or \$9,999. Although this does not clearly appear from the terms of the contract itself, we shall assume it to be true. The contract provides, among other things, as follows: "It is hereby mutually understood and agreed that all work to be done in constructing said bridge, and all material to be furnished therefor, shall conform strictly to the plans and specifications marked 'Plan No. 1,' which are hereto annexed and made a part of this contract; provided, how-

ever, that in case the parties of the second part (the commissioners) shall desire any alterations in the work as specified, or any additional work done in connection with the building of said bridge other than is hereby contracted for, they may have such alterations made or additional work done, upon giving reasonable notice in writing to the parties of the first part." It is then provided that, in case any dispute shall arise "as to the amount due * * * for additional work done or materials furnished other than is provided for in said specifications," such dispute shall be submitted to arbitration. It is recited in the agreed statement of facts that the county commissioners have already charged to their respective counties certain sums for mileage and *per diem* on account of trips made to the prospective site of the bridge for the purpose of selecting the site, and that the county surveyors have rendered services in surveying and locating the site, for which they have presented claims against the counties for amounts aggregating \$167.85. It is also set forth that the contract provides for inspection of the work as it progresses, and that such inspection will result in indebtedness against the counties. The plans and specifications mentioned in the contract have not been made a part of the record in this court, and do not appear to have been before the district court. Paragraphs 5 and 6 of the agreed statement of facts are as follows: "(5) That the contract in plaintiff's complaint mentioned does not provide for the building of any approaches to said bridge; that proper approaches will be necessary before said bridge can be used for public travel; and that their cost will approximate the sum of \$300. (6) That the question or proposition of building said bridge, or of expending any money therefor, has not been submitted to the electors of either of said counties."

It is contended that the contract is void for the reason that the county commissioners have failed to observe the provisions of that portion of Article XIII, section 5, of the state Constitution, which reads as follows: "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000), without the approval

of a majority of the electors thereof, voting at an election to be provided by law."

1. It is argued on the part of the appellant that the sums charged for mileage and *per diem* of the commissioners, and the expenses of county surveyors, should be added to the contract price in arriving at the amount of indebtedness incurred on account of the construction of the bridge. We do not regard this point as well taken. Necessary services of county officers, as such, devoted to a project which the county has in hand are a part of their ordinary duties, and should not be considered in arriving at the cost of the undertaking.

2. If it should become necessary, in carrying out the terms of the contract, to employ inspectors other than county officers, sums expended for that purpose should be regarded as a part of the aggregate cost of the project.

3. As the plans and specifications for the bridge are not before us, and were not before the district court, it cannot be said that the court found as a fact, or concluded as matter of law, that the Security Bridge Company undertook to construct the approaches as a part of their contract to build the bridge. Therefore we must give paragraph 5 of the agreed statement of facts its full import, to the effect that the contractors did not obligate themselves to build the approaches, and that an additional expenditure of approximately \$300 will be necessary in order to complete the bridge, with its approaches. The agreed statement of facts is of the same effect as a special verdict or finding of facts. (*Hartman v. Smith*, 7 Mont. 19, 14 Pac. 648; 1 Ency. of Pl. & Pr. 386.) The language of the Constitution is: "No county shall incur any indebtedness or liability for any single purpose," etc. Section 1416, Revised Codes, declares: "The word 'bridges' in this Act includes the approaches thereto. * * * " We therefore have no hesitancy in holding that the single purpose which the county commissioners of Yellowstone and Carbon counties undertook to accomplish was the construction of a bridge with the approaches thereto; and, as the contract price for the bridge alone was within two dollars of the

amount authorized to be expended for the whole purpose, the commissioners had no power to bind the counties by entering into such contract, for the reason that their purpose in its entirety could not be consummated without exceeding the constitutional limitation. The agreed statement of facts clearly shows that, after \$19,998 has been expended, the purpose in mind will be but partially realized, and that an additional expenditure will be necessary in order to complete it. This method of procedure may not be pursued. (*Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787; *Hoffman v. Board etc.*, 18 Mont. 224, 44 Pac. 973.)

4. Again, it is contended that the clause of the contract providing that the commissioners may elect to have additional work performed and material furnished vitiates the same. We cannot say from the contract itself that either county will see fit to exercise this option, and there is nothing in the agreed statement of facts to indicate that the commissioners threaten or propose to take advantage of it. We therefore content ourselves with the observation that what cannot legally be done directly may not be accomplished by indirection, and that any resort to the evasion of dividing up the amount sought to be expended would undoubtedly lead to disastrous consequences.

The judgment of the district court is reversed, and the cause is remanded, with directions to issue a permanent injunction in accordance with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

CARLSON, RESPONDENT, v. CITY OF HELENA, APPELLANT.

(No. 2,694.)

(Submitted April 24, 1909. Decided May 1, 1909.)

[102 Pac. 39.]

Municipal Corporations—Indebtedness—Extension of Constitutional Limit—Water and Sewer Bonds—Interest—Purchase of Water Supply—City Council—Discretion—Bonds—Validity—Redemption—Special Election Notice—Contents—Initiative and Referendum Statute—Inapplicability.

Municipal Corporations—Indebtedness—Extension of Constitutional Limit—Necessity for—How Determined.

1. Where the legislature had, by a general law applicable to all municipalities alike (Revised Codes, sec. 3259), extended the constitutional limit of indebtedness which a city could incur in the procurement of a water supply or the construction of a sewer system, it was not necessary that the question whether the necessity calling for an extension of the limit of indebtedness existed, be first submitted to the law-making power and authority obtained from it through a special Act. The determination of such necessity rested with the taxpayers affected by the contemplated improvement.

Same—Purchase of Existing Water Supply not Obligatory.

2. Subsection 64, of section 3259, Revised Codes, does not make it incumbent upon a city, when it desires to acquire a water supply of its own, to purchase the system then maintained therein by any person or corporation under a franchise granted or contract made by the municipality, the course pointed out in the proviso in said section relative to the purchase of the then existing system being obligatory only when the city "desires" to so purchase; if not, it may procure any other available supply.

Same—Interest—Definition.

3. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned.

Same—Indebtedness—Limitation on Amount—Interest.

4. In determining whether an indebtedness in excess of the limit authorized by law will be created by a proposed issue of municipal bonds, the interest reserved is not to be taken into account and added to the principal.

Same—Indebtedness—Constitutional Provision—When Complied with.

5. The authority conferred upon a city council by a special election called for that purpose, to incur additional indebtedness for water and sewer purposes, does not lapse upon the completion of the assessment-roll for the year in which the election is held. The requirement of section 6, Article XIII of the Constitution, that the question whether the debt shall be incurred must be submitted to the taxpayers "to be affected thereby," is satisfied if the council, after authority to

act has been voted, proceeds with reasonable diligence to issue and sell the bonds.

Same—Indebtedness—Extension—Submission to Electors.

6. To authorize a city to incur indebtedness beyond the limit prescribed by law, it is not necessary to hold two elections, one to extend the limit and incur the indebtedness, and one to issue bonds.

Same—Purchase of Water Supply—City Council—Discretion.

7. The discretion to purchase a particular water supply for a city is by law vested in the council exclusively, and of this discretion it may not divest itself by submitting the question whether a certain supply shall be purchased, without having first ascertained whether it is available and can be acquired for the amount of indebtedness to be incurred.

Same—Water Supply—Indebtedness—Provision for Payment.

8. The provision of section 6 of Article XIII, Constitution, that the revenues derived from a water system purchased or installed by a city shall be devoted to the payment of the debt incurred in its acquisition, does not impliedly prohibit the municipality from resorting to taxation to pay the principal and interest on the bonds evidencing the indebtedness.

Same—Bonds—Validity.

9. That municipal bonds upon their face pledge the full face and credit of the city to their payment is no objection to their validity.

Same—Bonds—Ordinances—Plurality of Subjects.

10. An ordinance calling for a special election for the authorization or rejection of an increase of the city's indebtedness by the issuance of water and sewer bonds, was not obnoxious to the prohibition contained in section 3265, Revised Codes, that no ordinance shall be passed containing more than one subject. The general subject of the ordinance was the incurring of the indebtedness, and the different purposes named in it as making the indebtedness necessary were matters of detail for the information of the voters.

Same—Powers—How to be Exercised.

11. Where a power is by law conferred upon a municipality and the mode of its exercise is pointed out, such mode must be pursued.

Same—Bonds—Time of Redemption.

12. In providing for the issuance of water and sewer bonds, it is incumbent upon the city council, under section 3460, Revised Codes, to make them redeemable, at its option, at a time prior to their maturity; its failure in this regard renders them void.

Same—Bonds—Notice of Election—Contents.

13. Section 3455, Revised Codes, does not require that the notice of an election called for the purpose of obtaining authority to issue water and sewer bonds, shall state the time of payment of interest thereon. Section 3459 provides that it shall be paid semi-annually and the elector must be presumed to have understood that the time of payment would be that fixed by the statute.

Same—Bonds—Payable in Gold Coin—Validity.

14. In the absence of legislation declaring otherwise, a city council may issue bonds "payable in gold coin of the United States of America, of the present standard of weight and fineness."

Same—Bonds—Ordinances—Initiative and Referendum Statute—Inapplicability.

15. The provision of section 3268, Revised Codes, that no ordinance passed by the council of a city shall become effective until thirty days after its passage, which section is a part of the initiative and ref-

erendum law applicable to cities (Revised Codes, secs. 3266-3276), has no application to an ordinance providing for the issuance of water and sewer bonds after sanction of the taxpayers affected thereby has been obtained. The law has to do with matters of general legislation on which all electors, whether taxpayers or not, may vote, while the question whether bonds shall be issued can be submitted to taxpayers only.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Oscar Carlson against the city of Helena. Judgment for plaintiff, and defendant appeals. Affirmed.

Mr. Edward Horsky, for Appellant.

Ordinance No. 717 did not contain two subjects. While the purpose of increasing the city's indebtedness was twofold, *viz.*, one for the issuance of bonds for a water supply and system, and the other for a sewer, but one subject is included in the ordinance, and it is clearly expressed in the title, namely, that of increasing the constitutional limit of indebtedness of the city. (See *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014; *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 655.)

The election was to be held April 25, 1908, and notice thereof was published in a newspaper printed and published in the city, commencing with April 4, 1908. This was a sufficient compliance with section 3455, Revised Codes. (*Scott v. Paulen*, 15 Kan. 162; *In re Woolridge*, 30 Mo. App. 612; *Coe v. Caledonia etc. Ry. Co.*, 27 Minn. 197, 6 N. W. 621; *Bean v. Barton County*, 83 Mo. App. 635; *Leonard v. Saline County Court*, 32 Mo. App. 633; *State v. Tucker*, 32 Mo. App. 620; *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059; *Brady v. Moulton*, 61 Minn. 185, 63 N. W. 489; *Winston v. State*, 32 Tex. Cr. 59, 22 S. W. 138.)

The purpose of a notice being to warn the electors that an election is to be held, it is sufficient if there is a substantial compliance with the statutes. (*San Luis Obispo County v. White*, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; *Johnson v. Kessler*, 76 Iowa, 411, 41 N. W. 57; *Hawthorn v. State*, 116 Ala. 487, 22 South. 894; *City Council of Waycross v. Youmans*, 85 Ga. 708,

11 S. E. 865.) The question is, whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election. (*Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161; *State v. Skirving*, 19 Neb. 497, 27 N. W. 723; *State v. McKinney*, 25 Wis. 416.)

The city may resort to taxation to pay interest on the bonds and provide a sinking fund. (See *Berlin Iron Bridge Co. v. City of Antonio* (Tex. Civ. App.), 50 S. W. 408; *Wright v. City of Antonio* (Tex. Civ. App.), 50 S. W. 406; *City of Boise v. Union Bank & Trust Co.*, 7 Idaho, 342, 63 Pac. 107; *Bruce v. City of Pittsburg*, 166 Pa. 152, 30 Atl. 834.)

Coupons providing for the yearly interest on the sum named in the bonds do not form part of the principal debt. (*Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; *Herman v. City of Oconto*, 110 Wis. 660, 86 N. W. 681; *Ashland v. Culbertson*, 103 Ky. 161, 44 S. W. 441; *Kelly v. Cole*, 63 Kan. 385, 65 Pac. 672; *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803; *Gibbons v. Mobile Ry. Co.*, 36 Ala. 410; *Blanchard v. Village of Benton*, 109 Ill. App. 569; *Finlayson v. Vaughn*, 54 Minn. 331, 56 N. W. 49; *Durant v. Iowa County*, 1 Woolw. 69, Fed. Cas. No. 4189.)

The question as to whether the city has power to condemn any water right can only be raised by a person whose rights are sought to be condemned; he is the only person interested. (*Yellowstone Park Ry. Co. v. Bridger Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 87 Pac. 963.) If such party is willing to waive such power of condemnation, no other person can possibly have the right to insist on the want of such power. (*Butte A. & P. Ry. Co. v. Montana Union Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298.) Abundance of pure water is an absolute necessity for every city for the purpose of protecting the life and health of its inhabitants. It is also necessary for the protection of property in the city from fire, and for many other purposes. In *Van Reipen v. City of New Jersey*, 58 N. J. L. 262, 33 Atl. 740, it was held that a city has a right

to condemn and appropriate water already appropriated and used by a canal company, which is a quasi-public corporation, and the waters used by it devoted to public use. If a city can appropriate waters used by a canal company it surely can appropriate waters used by a farmer for irrigation. (See *Feliz v. City of Los Angeles*, 58 Cal. 73; *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.)

Mr. C. W. Wiley, for Respondent.

When the length of time of the notice is fixed by statute, a shorter time will not suffice. (10 Am. & Eng. Ency. of Law, 630; *Harding v. Rockford R. R. Co.*, 65 Ill. 90; *George v. Oxford Tp.*, 16 Kan. 72.) *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754, declares that in general elections, time, place and manner are fixed by law, and statutory requirements as to notice are directory; but that in the case of special elections the statutory requirements are mandatory. (See, also, *People v. Porter*, 6 Cal. 26; *People v. Martin*, 12 Cal. 409; *People ex rel. Westbrook v. Rosborough*, 14 Cal. 181; *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *People v. Supervisors etc. of Santa Anna*, 67 Ill. 57; *People v. Seale*, 52 Cal. 71.) "Where the statute authorizing the issuance of municipal bonds prescribes the mode in which the power is to be exercised, the municipality can act only in the mode prescribed, and all conditions imposed by the legislative or constitutional provisions with regard to the exercise of the power must be strictly complied with." (21 Am. & Eng. Ency. of Law, 45; *German Ins. Co. v. City of Manning*, 95 Fed. 597; *Swan v. Arkansas City*, 61 Fed. 478; *McLure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129; *Aylmore v. City of Seattle*, 48 Wash. 42, 92 Pac. 932.)

If said section 3268, Revised Codes, applies to Ordinances 747 and 748, then they did not go into effect until thirty days after March 1, 1909, and, therefore, the notices of the sale of the bonds provided therein are nugatory, premature and of no force and effect, and, hence, would render the proposed sale of bonds of May 1, 1909, invalid. (*McLure v. Oxford Tp.*, 94

U. S. 429, 24 L. Ed. 129; *Manhattan Co. v. City of Ironwood*, 74 Fed. 535, 20 C. C. A. 642; *National Bank v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212; *Town of Rochester v. Bank*, 13 Wis. 432, 80 Am. Dec. 745, 746; *Keane v. Cushing*, 15 Mo. App. 96.)

Messrs. Gunn & Rasch, and Mr. J. A. Walsh, Appearing as Amici Curiae.

That part of subdivision 64, section 3259, Revised Codes, requiring the purchase of the existing water system and supply, is not unconstitutional, notwithstanding what is said in *Helena Con. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412. (See *City of Walla Walla v. Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; also *Citizens' Gas Light Co. v. Inhabitants of Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.)

If, however, it is unconstitutional, then the entire law on the subject of an indebtedness for a water supply in excess of the three per cent limit is inoperative and void. (See *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115; *Pollock v. Trust Co.*, 158 U. S. 635, 15 Sup. Ct. 912, 39 L. Ed. 1108; Cooley's Constitutional Limitations, 4th ed., 215-217; *Warren v. Mayor*, 2 Gray, 84; *Jones v. Jones*, 104 N. Y. 235, 10 N. E. 269; *People v. Briggs*, 50 N. Y. 566; *Commonwealth v. Hitchings*, 5 Gray, 485; *Allen v. Louisiana*, 103 U. S. 84, 26 L. Ed. 318; *Wills v. Austin*, 53 Cal. 179; *San Francisco v. Spring Valley W. W.*, 63 Cal. 530; *Virginia Coupon Cases*, 114 U. S. 305, 5 Sup. Ct. 903-1020, 29 L. Ed. 185; Sutherland on Statutory Construction, secs. 176-180.)

The interest, as well as the principal, should be considered in determining the extent of the obligation or the amount of indebtedness which will be incurred by the issuance of bonds. (See *State v. City of Helena*, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99, 55 L. R. A. 336; *Burlington Water Co. v. Woodward*, 49 Iowa, 59; *City of Springfield v. Edwards*, 84 Ill. 626; *Coulson*

v. *Portland*, Fed. Cas. No. 3275, Deady, 481; *State v. Hickman*, 11 Mont. 541, 29 Pac. 92; *State v. Barrett*, 25 Mont. 112, 63 Pac. 1030; *Herman v. City of Oconto*, 110 Wis. 660, 86 N. W. 681.)

The authority conferred by the election held in April expired at the time of the completion of the assessment-roll for this year. (See *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.)

The power of a city to incur an indebtedness does not embrace authority to issue bonds. The authority to issue bonds must be expressly conferred, and cannot be implied from the power to incur an indebtedness. (*City of Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; *Lehman v. San Diego*, 83 Fed. 669, 27 C. C. A. 668; 1 Abbott on Municipal Corporations, 169a-170; *Hill v. Memphis*, 134 U. S. 204, 10 Sup. Ct. 562, 33 L. Ed. 887.) If two elections are required, or if two questions are to be submitted, the election held did not confer any authority. (*Rea v. City of La Fayette*, 130 Ga. 771, 61 S. E. 707; *Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *Lewis v. Bourbon County*, 12 Kan. 186; *Elyria v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 335; *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. 913; *City of Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400; *McMillan v. Lee County*, 3 Iowa, 311.)

The city had not the right to submit to the taxpayers the question of procuring a particular supply. The rule is that a municipal council cannot delegate a power requiring the exercise of judgment and discretion. (28 Cyc. 276-278; 2 Abbott on Municipal Corporations, 575; see, also, *In re Quong Woo*, 13 Fed. 229, 7 Saw. 526; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Blair v. City of Waco*, 75 Fed. 800, 21 C. C. A. 517.)

Bonds cannot be issued to procure a water supply from McClellan creek until it has been determined that such a supply can be procured. It is necessary for the city, in order to acquire the right to the use of such water, to allege and prove that the use for which it is seeking to take the water is a more necessary public use than the use for irrigation. (*Helena v. Harvey*,

6 Mont. 114, 9 Pac. 903; 2 Lewis on Eminent Domain, 2d ed., p. 894.)

The city cannot resort to taxation to pay principal and interest of bonds, but debt must be paid from revenue to be derived from plant. (Constitution, Art. XIII, sec. 6; *Nashville v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Forbes v. Grand County*, 23 Colo. 344, 47 Pac. 390; *Minot v. Boston*, 142 Mass. 274, 7 N. E. 920.)

Where there is a doubt as to the power of a municipality to contract indebtedness, the doubt must be resolved against it. (*Butler v. Andrus*, 35 Mont. 580, 90 Pac. 785; *Palmer v. City of Helena*, 19 Mont. 61, 47 Pac. 209.)

Ordinance No. 717 is void in that it contains several separate and distinct subjects, to-wit, the constructing or purchasing of waterworks and the construction of sewers. (*Yessler v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014.)

The provisions of the statute are mandatory upon the city council, and an ordinance containing more than one subject is void. (*Missouri P. R. Co. v. City of Wyandotte*, 44 Kan. 32, 23 Pac. 950; *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. 745.)

The ordinance also has to do with (a) extending the limit of indebtedness of a city; (b) issuing bonds; and (c) procuring a supply of water from McClellan creek. Each of these is a distinct and separate subject. (*Silva v. City of Newport*, 119 Ky. 587, 84 S. W. 741; *Marion Water Co. v. Marion*, 121 Iowa, 306, 96 N. W. 887; *Missouri P. R. Co. v. Wyandotte*, 38 Kan. 573, 16 Pac. 745.)

The city had no authority to issue bonds providing for payment "in gold coin of the United States of America of present standard weight and fineness." The trend of modern decisions is to restrict contracts for the payment of public indebtedness in gold coin, and to hold that the power to make such contracts must be expressly given. (*Burnett v. Maloney*, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; *City of Cincinnati v. Anderson*, 10 Ohio C. C. 265; *Bronson v. Rodes*, 74 U. S. 229, 19 L. Ed. 141.)

The election held did not authorize issuance of bonds providing for levy and collection of taxes to pay principal and interest and pledging faith and credit of city. There was not a suggestion, either in the ordinance providing for the election or upon the face of the proposition, that taxes were to be levied on all the taxable property of the city to provide for the payment of the debt, and that the good faith and credit of the city generally should stand pledged for its punctual payment. "The subsequent proceedings must conform to the resolution. It cannot be altered or amended by them. A substantial departure from the resolution leaves the proceedings without foundation to support them." (*Elyria v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 337; *Nalle v. City of Austin* (Tex. Civ. App.), 21 S. W. 379; *Skinner v. Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512; *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932; *Big Grove v. Wells*, 65 Ill. 263; *Brown v. Carl*, 111 Iowa, 608, 82 N. W. 1033.)

All laws permitting public indebtedness to be increased must be strictly pursued. (*Dawson v. Waterworks Co.*, 106 Ga. 696; *Davis v. Dougherty County*, 116 Ga. 491, 42 S. E. 764; *Bowen v. Town of Greensboro*, 79 Ga. 709, 4 S. E. 159.)

Mr. Edward Horsky and Mr. C. A. Loomis, in Reply.

The provisions of sections 3454, *et seq.*, Revised Codes, as to time and interest, are directory. (*Township of Rock Creek v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Supervisors v. Galbraith*, 99 U. S. 217, 25 L. Ed. 411; *Board of Commissioners v. Vandriss*, 115 Fed. 866, 53 C. C. A. 192; *Lyons v. Lyons Nat. Bank*, 19 Blatchf. 279, 8 Fed. 376; *Dows v. Town of Elmwood*, 34 Fed. 117; *E. M. Derby & Co. v. City of Modesto*, 104 Cal. 515, 38 Pac. 900; *State v. Moore*, 46 Neb. 593, 50 Am. St. Rep. 628, 65 N. W. 194; 9 Rose's Notes (U. S.), pp. 425, 426.)

As to the right of the city to issue gold bonds, see: *Woodruff v. Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973; *Judson v. City of Bessemer*, 87 Ala. 240, 6 South. 267, 4 L. R. A.

742; *Winston v. Fort Worth* (Tex. Civ. App.), 47 S. W. 740, 745.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff, a taxpayer and resident of the city of Helena, brought this action to test the validity of proposed issues of bonds by the city to the amount of \$600,000, for the purpose of procuring a water supply and installing a system of pipes for its distribution, and \$70,000 for the purpose of extending one of its sewers. From the complaint we gather the following facts:

On March 3, 1908, the mayor and the city council of the city of Helena, having determined that it was for the best interests of the city to own and control its own water supply and water system, and that a supply could be obtained from McClellan creek and brought into the city by an expenditure of \$600,000, and also that a needed extension of the sewer system of the city could be effected by the expenditure of \$70,000, provided the necessary funds could be realized from the sale of bonds issued by the city for these purposes, the issuance of such bonds being made necessary by the fact that the city was already indebted in excess of the three per cent limit imposed by the Constitution (Constitution, sec. 6, Art. XIII), enacted an ordinance reciting these facts and providing for a submission to the taxpayers of the city of the question whether the limit of indebtedness should be extended to procure the funds for these purposes. This course was adopted in order to make available the permission granted by the legislature (Revised Codes, sec. 3259, subd. 64), in pursuance of the proviso contained in the section of the Constitution referred to. The ordinance, designated as "Ordinance No. 717," provides:

"Section 1. That a special election be held in the city of Helena on the twenty-fifth day of April, 1908, for the purpose of ascertaining the will of the taxpayers, to be affected thereby, and that authority may be given and power conferred upon

the city council to increase the indebtedness of said city over and above the three per cent limit fixed by law, by the issuance: (1) Of water bonds of said city to the amount of six hundred thousand (600,000) dollars for the purpose of securing a water supply for said city, from McClellan creek and constructing a water system for said city, which said water supply and water system the city shall own and control and the revenue from which shall be devoted to the payment of the indebtedness incurred therefor, and (2) of sewer bonds to the amount of seventy thousand (70,000) dollars for the purpose of connecting the main west side sewer with the sewer farm and the Broadwater addition with such extension on the west side sewer and of connecting the sewer farm with Prickly Pear creek."

It further prescribes the character of the proposed bonds as \$600,000 of water bonds and \$70,000 of sewer bonds, all to be payable in not to exceed twenty years, and redeemable "in such manner" as might be provided in the ordinance directing their issuance, 'to be in denominations of \$100 or multiples thereof, and "to bear interest at not over five per cent per annum." It also prescribed separate ballots to be used at the election, so that the electors could vote for or against the issuance of bonds for either purpose. The election was held on the date named, notice thereof, containing all the provisions of the ordinance above quoted or stated in substance, having been published in the "Helena Daily Record," a newspaper published in the city, for the three weeks beginning on April 4 and ending on April 25, and posted for a like period in three public places in the city. The result of the election showed a large majority in favor of both bond issues. Thereupon, and in pursuance of the authority thus given by the electors, an ordinance, designated as "Ordinance No. 747," was passed by the council and approved by the mayor on March 1, 1909, which, after reciting the proceedings had under Ordinance 717, authorized and directed the issuance of coupon bonds, signed by the mayor and the clerk, to the full amount of \$600,000, dated January 1, 1909. It is therein prescribed that the bonds shall be for \$1,000 each, numbered

from 1 to 600, inclusive; that they shall be designated as "water bonds"; that they shall be payable in "gold coin of the United States of America of the present weight and fineness"; that they shall be payable, \$100,000 at the expiration of ten years, \$100,000 at the expiration of fifteen years, and the remainder at the expiration of twenty years from the date thereof; and that they shall bear interest at the rate of five per cent per annum, payable semi-annually on January 1 and July 1 of each year, upon presentation of the coupons attached thereto, both principal and interest being payable at the office of the treasurer of the city of Helena, or, at the option of the holder, at some bank in the city of New York to be designated by the city treasurer. It is further provided that the different installments due and payable at the dates mentioned shall be redeemable at the same dates. Provision is made for the sale of the bonds to the bidder offering the highest price therefor, at the council chamber in the city hall, on May 1, at 12 o'clock noon, and the city clerk is directed to give notice accordingly in some newspaper published in the city of Helena, and also in a newspaper published in the city of New York, for a period of not less than four weeks. A like ordinance, numbered 748, was passed and approved on the same date, authorizing and directing the issue of bonds to the amount of \$70,000, to be known as "sewer bonds," bearing the same date, having the same denominations, bearing the same rate of interest, and payable in installments and redeemable at the same time and place as the other bonds, as follows: \$10,000 at the expiration of ten years, \$10,000 at the expiration of fifteen years, and the remainder at the expiration of twenty years from date. The clerk was directed to give notice in the same manner that this issue would be sold at the same time and place as the water bonds and upon the same terms. It is alleged that the notice is now in course of publication as directed. The coupons attached to these bonds are to be made payable in lawful money of the United States. The recitals on the face of the bonds are to the effect that the city is not indebted in excess of the constitutional limit, that all the require-

ments of law touching the issuance of them have been fully complied with, and that the full faith and credit of the city is pledged in payment of both principal and interest.

It is alleged that the city is now indebted in outstanding bonds to the amount of \$488,800; that the assessed valuation of the property in the city in 1907 was \$10,799,000, and in the year 1908 \$11,629,833; that the amount of the bonds now proposed, together with the interest to be paid thereon from date until maturity, will far exceed ten per cent of the assessed valuation of the property in the city, for either the year 1907 or 1908, without including the present amount of its indebtedness; and that, if they are permitted to be sold and to pass into the hands of *bona fide* purchasers, containing, as they do, recitals that the city is not indebted beyond the constitutional limit, and that all the requirements of the Constitution and laws of the state of Montana prior to their issuance have been observed, the city of Helena will be estopped to question their validity upon any ground whatever. It is also further alleged that there flows in McClellan creek, referred to in Ordinance 717, at the point at which the city proposes to make its diversion, three hundred and fifty inches of water, all of which has been appropriated by private individuals and is being used by them for the irrigation of farm lands lying adjacent to and along the stream; that the city has commenced an action in the district court of Jefferson county against one Dima S. A. Turner and others, for the purpose of acquiring, by the exercise of the right of eminent domain, the right to the use of one hundred and fifty inches of the water of McClellan creek, which has heretofore been used for mining and irrigating purposes on lands lying entirely outside of the watershed of McClellan creek, and which has never returned thereto or to any stream of which McClellan is a tributary; that the city has also commenced an action in the district court of Lewis and Clark county against one Burgess and others, for the purpose of acquiring by the same means the right to the use of three hundred and fifty inches of water of McClellan creek, owned and used as aforesaid; that both of these rights

are intended to be used to supply the inhabitants of the city with water; that both of these actions are now pending and undetermined; that by means of them and by some arrangement made with the said Turner the city "claims that it has and will acquire" the right to the use of three hundred and fifty inches of the water of McClellan creek for the purpose aforesaid; and that, if the city council is not enjoined, it will proceed to issue and deliver the bonds; that it will levy and collect taxes upon all the taxable property in the city for the payment of the interest thereon, and will construct the proposed water system to supply the city, all contrary to the law and to the irreparable injury of plaintiff and other taxpayers similarly situated. The prayer is for a perpetual injunction to restrain the defendant and its officers from proceeding further in the premises.

The district court having overruled a general demurrer, and the defendant having declined to plead further, judgment was entered for the plaintiff. The appeal is from the judgment. A motion to dismiss the appeal, made by members of the bar as *amici curiae*, on the ground that the action was collusive, was overruled (38 Mont. 581, 101 Pac. 163), but the movants were allowed to appear and assist counsel for respondent upon the argument. This they did, besides filing elaborate briefs. Many of the contentions made at the hearing arise upon alleged irregularities in the proceedings anterior to the election, such as the giving of notice of the registration of electors, the sufficiency of the publication of the notice of election, and similar matters. These proceedings we have not deemed it necessary to set forth in detail, since, upon an examination of them, we have concluded that it is not necessary to determine the contentions made with reference to them. We can most conveniently notice the other contentions by taking up the objections made by counsel for respondent to the validity of the bonds somewhat in the order pursued in their briefs.

1. The Constitution, Article XIII, section 6, declares: "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, in-

cluding existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; *Provided*, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Section 3259, Revised Codes, after declaring that a city or town has power to contract indebtedness for the erection of public buildings, construction of sewers, waterworks, etc., to an amount not in excess of three per cent of the taxable property therein, as ascertained by the last assessment for state and county purposes, adds the following provisos: "*Provided*, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt. The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent heretofore referred to of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and, *provided* further, that the above limit of three per centum shall not be extended, unless

the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election. It is further *provided*, that whenever a franchise has been granted to, or a contract made with any person or persons, corporation or corporations, and such person or persons, corporation or corporations, in pursuance thereof, or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water, desired by the city or town for supplying the said city or town with water, the city or town granting such franchise, or entering in such contract, or desiring such water supply, shall, by the passage of an ordinance, give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations, and it shall have the right to so purchase the said plant or water supply upon such terms as the parties agree; in case they cannot agree, then the said city or town shall proceed to acquire the same, under the laws relating to the taking of private property for public use; and any city or town acquiring property under the laws relating to the taking of private property for public use shall make payment to the owner or owners of the plant or water supply of the value thereof legally determined, within six months from and after final judgment is entered in the condemnation proceedings. * * *

It is gathered from the complaint that the present indebtedness of the city, to the amount of \$488,800, was contracted for the construction of the sewer system which it is now proposed to extend, and for other purposes, prior to the year 1893, when the assessed valuation of the property subject to taxation was much greater than during the year 1907 or 1908, and that it is an indebtedness not in excess of the constitutional limit of three per cent, as the assessed valuation stood at the time it was contracted. It may therefore be eliminated from this discussion.

The first contention made grows out of the different views of counsel as to the construction which should be given to the pro-

viso in the section of the Constitution, *supra*. Citing *Butler v. Andrus*, 35 Mont. 575, 90 Pac. 785, to the point that there can be no extension of the limit of indebtedness beyond the three per cent limit in any event unless a necessity requiring it has been determined, and then putting the question, "Who is to determine whether such a necessity exists?" counsel insist that this determination rests with the legislature, and that, whenever any city desires to secure a water supply and install its own water plant or construct a sewer system, it must first obtain a special Act of the legislature authorizing it to submit to the taxpayers the question whether the limit shall be extended. Counsel for defendant take the position that the law, as it stands, properly leaves the determination of the necessity calling for the extension of the limit to the people who must pay the additional taxes required in order to discharge the debt to be incurred. The latter position we think is correct. There is no doubt that the purpose of the convention in restricting the power of municipalities to contract indebtedness was to prevent extravagance. Nor can it be doubted that the purpose of the legislature in enacting the Code provision was to make effective the provision of the Constitution. (*Butler v. Andrus, supra.*) It is vested with the power to extend the limit. This it did, by a general law applicable to all municipalities alike, fixing it, for the two purposes mentioned only, at ten per cent over and above the three per cent limit, thus evincing an intention on its part to prevent extravagance in providing even for necessities which are often imperative. Evidently it also had in mind the general policy of the Constitution that the people in the different municipalities must be allowed, so far as possible, to control their own affairs, as well as the express provision that, "where a general law can be made applicable, no special law shall be enacted." Accordingly, it construed the provision to mean that it could, by a general law, grant permission to all the municipalities in the state to incur the additional indebtedness when the people residing and owning property therein should judge it to be necessary. It also recognized the implied limitation of its

power in the method prescribed for it to pursue in granting the permission, to-wit, by authorizing *municipal corporations* to submit the question to a vote of "the taxpayers affected thereby," leaving it to them, when they come to express their wishes at the ballot-box, to be governed by their own views of the necessities of the case as they see them in view of their ability to bear the additional burden of taxes to which they must submit. A contrary conclusion would result in overturning the statute and require the legislature to resort to special legislation in every case where the people of a city or town have reached the conclusion that their necessities require them to own and control their own supply of water or to construct or extend a sewer system after ascertaining by the hearing of evidence whether the alleged necessity exists, with the inevitable result that the health and comfort of the inhabitants of the municipalities would be exclusively in the hands of a body of men who would know and care the least about them. We cannot adopt a construction which would lead to this result.

2. Contention is made that the fourth proviso of the statute makes it incumbent upon a city or town, whenever it desires to procure a water supply, and there has been installed and maintained therein a system of water supply by any person or corporation under a franchise granted or contract made by the city, to first acquire such system of water supply, and that indebtedness may not lawfully be incurred by the issuance of bonds for the purpose of securing any other supply. It must follow, therefore, it is said, that, since the proposed issue of water bonds is expressly declared to be for the purpose of procuring a supply other than the one now maintained by a corporation under a franchise granted by the defendant, the issue would be without authority of law. There is no merit in this contention. The statute does not limit the power of choice of the city in this regard. The course pointed out in this proviso to be pursued is obligatory only when the person or corporation owns a supply *desired* by the city for its own use. If it does not desire the particular supply, it may procure any

other one available, as is made clear by the language of the proviso itself, and also by another provision contained in the latter portion of the subdivision which authorizes a city, through its council, to "procure and appropriate water rights and title to the same and the necessary real and personal property to make said rights and supply available." It does not appear from the record that the city is now being supplied with water by any person under a franchise or contract, but this is assumed by the parties to be the fact. Consequently we have considered the contention as though the question involved were properly before us for decision.

3. Much contention is made over the question whether the interest, as well as the principal, of the proposed issue of bonds should be taken into account in determining whether an indebtedness will be created thereby in excess of the ten per cent limit authorized by the statute. If the interest should be taken into account and the amount of it be added to the \$670,000, of principal, as counsel contend, the sum would exceed ten per cent of the assessed valuation for 1907—the basis upon which it must be estimated—by several thousand dollars. The whole of the issue would then be void. This contention proceeds upon the theory that, when interest is expressly reserved in the contract, it becomes a part of the debt, and hence, in determining the amount of indebtedness which a city may contract by the issuance of bonds, the interest up to the date of maturity must be added to the principal. It is true that the reservation of interest is as much a part of the contract as the main promise (*State ex rel. State Savings Bank v. Barrett*, 25 Mont. 112, 63 Pac. 1030), yet no authority has been called to our attention which furnishes support for the rule contended for. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned. If this is not the correct rule, then, as observed by the supreme court of Wisconsin in *Herman v. City of Oconto*, 110 Wis. 660, 86

N. W. 681, "most of the cases in the books relating to the ascertainment of municipal indebtedness have been wrongly decided." The subject has frequently been considered by the courts of last resort in states having constitutional and statutory provisions similar to ours, *supra*, and the conclusion reached has been almost invariably against the contention here made. (*Herman v. City of Oconto*, *supra*; *Finlayson v. Vaughn*, 54 Minn. 331, 56 N. W. 49; *Kelley v. Cole*, 63 Kan. 385, 65 Pac. 672; *Blanchard v. Village of Benton*, 109 Ill. App. 569; *City of Ashland v. Culbertson*, 103 Ky. 161, 44 S. W. 441; *Gibbons v. Mobile & Great Northern R. Co.*, 36 Ala. 410; *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. 5; *Epping v. City of Columbus*, 117 Ga. 263, 43 S. E. 803; *Durant v. Iowa County*, 1 Woolw. 69, Fed. Cas. No. 4189; see, also, 2 Abbott on Municipal Corporations, sec. 160.) All of these cases rest upon the principle that the authority granted by the Constitution or statute, as the case may be, to contract a debt, refers to the amount of the debt at the date at which it is created, and has no reference to the amounts of interest which accrue thereafter, and thus construe the fundamental law according to the sense in which the terms "debt" and "obligation" are used in the language of the common people.

Counsel contend, however, that this court foreclosed the question under consideration by the decision in *State ex rel. Helena Waterworks Co. v. City of Helena et al.*, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99, 55 L. R. A. 336. It is true there are many statements in the opinion indicating that this court entertained the conviction that the term "obligation," as used in the Constitution, applies to any sort of a contract which will certainly result in a debt *in futuro*, as well as to one creating a debt *in praesenti*. But we may not overlook the question actually presented and decided. The contract involved was for a water supply for the city for a term of five years. The city was in default in its monthly payments. It was, at the time the contract was made and at the time the action was brought, indebted much beyond the constitutional limit. The purpose

of the action was to compel, by *mandamus*, payment of the monthly installments due for many months, amounting to several thousand dollars. The two questions at issue were, whether the contract was void *ab initio*, as creating an obligation on the part of the city which would inevitably result in a debt in excess of the limit, and whether the installments already due were debts within the meaning of the Constitution. Both questions were answered in the affirmative, the first upon the authority of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, and the second under the rule declared in *City of Springfield v. Edwards*, 84 Ill. 626, and similar cases. But this conclusion was held not to overrule or discredit the earlier case of *State ex rel. Great Falls Waterworks Co. v. Great Falls*, 19 Mont. 518, 49 Pac. 15; on the contrary, the rule announced therein was approved. That was also an application for *mandamus* to compel the defendant city to pay installments due upon a similar contract for a water supply furnished to the city by the relator. While approving the conclusion stated in *Davenport v. Kleinschmidt*, *supra*, this court held that inasmuch as the statute then in force (Session Laws 1889, sec. 16, p. 185) authorized the city to levy a special tax for a water supply, and inasmuch as the contract had been entered into in contemplation of a special fund being thus created by the city to meet the installments due from time to time, the contract did not create a debt within the meaning of the prohibition, and that the city should levy the tax and devote the proceeds to the payment of them. The interest charge here falls clearly within the rule of this case. Section 3459 of the Revised Codes provides: "A tax to be fixed by ordinance must be levied each year for the purpose of paying interest on the bonds [for water and sewer purposes] and to create a sinking fund for their redemption." The legislature in the enactment of this provision clearly evinced the intention that the interest installments falling due upon such bonds from time to time should not be deemed an indebtedness within the meaning of the Constitution, but that they should be paid out of the special fund thus created;

and it cannot be doubted that *mandamus* would lie, just as in the *Great Falls Case*, to compel both the levy of the tax and the payment of interest out of the special fund thus provided, and this without regard to the general rule declared in the cases *supra*: That interest reserved is not to be taken into the estimate in ascertaining the amount of a city's indebtedness.

Counsel for respondent also cite and rely with confidence upon the case of *Coulson v. City of Portland*, Fed. Cas. No. 3275, 6 Fed. Cas. 629. It is not directly in point either in fact or principle, but, were it so, in view of the foregoing considerations, we are not inclined to accept and follow it as authoritative.

4. Counsel submit the question whether the authority conferred upon the city council by the election of April, 1908, lapsed, at the time of the completion of the assessment-roll for 1908. It is contended that since the Constitution provides that the question whether the debt shall be incurred must be submitted to the taxpayers "to be affected thereby," and property is transferred from time to time, the body of the taxpayers changes from year to year, and hence that the persons whose names appear upon the roll completed for the year 1908, and who are to be affected by the indebtedness, were entitled to be consulted. The provision of the Constitution must be given a reasonable construction. The necessities of a particular city or town may require it to incur an indebtedness at any time. So it requires time in which to hold the election. It requires time for the council, in pursuance of the authority conferred by the election, to advertise and put the bonds upon the market. The limit of time fixed by law during which the annual roll must be completed is the first Monday in October. (Revised Codes, sec. 2609.) If after the beginning of any year it should be necessary to issue bonds, and from any unforeseen delay, resulting from litigation or mistake, or any other like cause, they should not actually be sold and the money received for them before the first Monday in October, then, under the construction contended for, all the proceedings already had would be nugatory. A more reasonable view is that, after the election has been held and the indebtedness authorized,

the council may proceed to issue and sell the bonds, provided only that the authority conferred is executed with reasonable diligence. Although, in the meantime, there may have been changes in the body of the taxpayers affected by the increased indebtedness, this fact should no more affect the validity of the bonds than should such changes during the progress of the election. The body, as a body, to be affected having expressed its assent, this assent should not be rendered abortive by fluctuations in its numbers from day to day. After the authority to incur an indebtedness beyond the constitutional rate has been granted, the requirements of the fundamental law should be deemed satisfied, provided the council proceeds with reasonable diligence and the amount of indebtedness incurred does not exceed the rate of the extension when calculated upon the basis of either assessment-roll. (*Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059; *Chicago, Burlington & Quincy R. R. Co. v. Village of Wilber*, 63 Neb. 624, 88 N. W. 660.)

5. It is said that the authority of the city to incur an indebtedness does not include an authority to issue bonds, and therefore that two elections were necessary to authorize the proposed issue, (1) To extend the limit and incur the indebtedness, and (2) to issue bonds. It is not necessary to inquire whether the power conferred upon a municipality to incur indebtedness does not imply the additional power to issue evidences thereof, in the form of negotiable securities. Here the authority is expressly given. The Constitution does not prescribe the mode by which the legislature may authorize submission to the taxpayers of the question whether an indebtedness shall be incurred. The legislature, therefore, was free to prescribe such method as it chose. The method of procedure and the form of the question to be submitted by the council are prescribed in sections 3454 *et seq.*, Revised Codes. The form of the submission requires the electors to vote "Yes" or "No" upon the question whether bonds shall be issued; so that, in voting upon this question, they authorize the debt to be incurred by the issuance of bonds. The contention must be overruled.

6. A more serious and difficult question arises out of the contention that the city council has no authority to submit to the electors the question whether a particular water supply must be obtained, or, if it has, that the question may not be submitted in this restricted form until it has first been ascertained that the particular supply is available and what its cost will be. In other words, the contention is that the council is authorized to consult the taxpayers generally as to whether it may proceed to acquire a supply of water for the city, but that it may not divest itself of the discretion vested in it by law, as the governing body of the city, by leaving it to the electors to select a particular supply. This objection, it is said, is fundamental, because the discretion to purchase a particular supply is vested in the council, and this discretion cannot ordinarily be exercised until the council has ascertained that the particular supply is available, and that the cost of acquiring and installing it can be compassed by the amount of the indebtedness to be incurred. The contention must be sustained. The city may acquire a water supply by the exercise of the right of eminent domain. The statute *supra* expressly so provides (*City of Helena v. Rogan*, 26 Mont. 452, 68 Pac. 798), even though it may already have been appropriated to some other public use, as is the fact with regard to the water flowing in McClellan creek. A beneficial use of the water flowing in the streams of the state is a public use. (Constitution, Art. III, sec. 15.) It may nevertheless be appropriated to a more necessary public use. (Revised Codes, sec. 2213; *Butte, Anaconda & Pac. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298.) While this is true, it does not necessarily follow that the city can acquire the exclusive right to the use of the water in a particular stream. It must first be shown that the use for which it is sought is a more necessary use; and then the city must be able financially to make compensation to the person or persons entitled to the present use. Lands in this state are usually of no value for agricultural purposes, without irrigation by artificial means. The taking by the city of a supply of water

used for this purpose, therefore, is also in effect the taking of the lands to which it has been made appurtenant, and the attendant cost may be so great that the city may not be able or willing, after the cost has been ascertained, to make the necessary compensation.

If the council should have first ascertained that the particular supply could be acquired, and that the cost of it, together with the cost of installment, is within the compass of the sum which the city can lawfully expend for that purpose, then there could be no possible objection to allowing the voters to speak as to the propriety of securing the particular supply. The council would then have exercised the discretion which is vested in it by law. If, however, all these matters have not already been determined, the vote becomes nugatory, because the assent given by the voters for the acquisition of the particular supply limits the discretion of the council, with the result that if it is thereafter found that the contemplated supply cannot be secured, or that the cost of installment is beyond the financial capacity of the city or not within the compass of the sum secured by the sale of the bonds under the extension already voted, the debt incurred can serve no purpose. It appears from the complaint that the council has authorized condemnation proceedings to acquire the right to the use of the water of McClellan creek, but that these proceedings have not yet been determined. It thus appears, and it is admitted by counsel for appellant, that the cost of acquiring the right has not been ascertained. If the intention to acquire it should be abandoned for any cause hereafter—and it cannot now be surmised what difficulties may be encountered—the city would have in its treasury the money derived from the sale of the bonds, without any use to which the council could devote it. The orderly course of procedure would be to submit the question generally whether the indebtedness, not in excess of a definite amount within the limit, should be incurred; then the council would be left free, in case the indebtedness should be authorized, to use its discretion in securing one supply or another, according as its judgment would dictate. The discretion

of the council in this particular is exclusive, and it cannot lawfully divest itself of it by casting it upon the voters, with the probably, or even possibly, absurd consequences to which we have adverted. (28 Cyc. 277, and cases cited in notes; Dillon on Municipal Corporations, 4th ed., sec. 96.) Having ascertained that a supply can be obtained, the council may then proceed, and, under the authority granted by the electors to incur the necessary indebtedness, to issue and sell bonds, acquire any supply which its judgment may dictate, and have it installed so that it may become available.

It might, perhaps, be said that the vote upon the submission in its restricted form could not be held binding upon the council in case it should turn out that the right to the use of the water in McClellan creek could not be acquired. This may with equal propriety be answered by the statement that the voters were not asked to extend the limit generally for water supply purposes, and it cannot be said that assent to incur the indebtedness would have been given if the question had been submitted generally, as the statute contemplates. (*Skinner v. City of Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512.)

7. It is said that the city cannot resort to taxation to pay the principal and interest of the water bonds, but payment must, under the provision of the Constitution, be made exclusively from revenues to be derived from the water plant acquired by it. The question involved does not properly arise in this case. The validity of any bonds issued under authority of the statute applicable cannot be affected by the fact that in providing for their payment the council may have imposed an illegal tax upon the people in the municipality. The power to impose the tax has nothing whatever to do with the power to increase the debt. If the council has in any case exceeded its power in imposing a tax, the legality of the tax must be tested in proceedings brought for that purpose. But it may not be out of place to venture the remark that the requirement that the revenues derived from the water plant is not to be regarded as the only provision permissible for the payment of the bonds. In so far

as the Constitution imposes a limitation upon the power of the legislature, the extent of it is to require that the revenues derived from the water plant be devoted to the payment of the debt, and to prohibit their use for any other purpose. This limitation, however, does not imply a prohibition to grant the authority to the municipality to make additional provision for payment, which it has done in the Code provision *supra*. (Revised Codes, sec. 3459.) Nor is it any objection to the proposed bonds that upon their face they would pledge the full faith and credit of the city to their payment. As a matter of law, the full faith and credit of the city would be so pledged in case the bonds were issued. The fact that the formal pledge should be set forth in them could not affect their validity.

8. Counsel insist that Ordinance No. 717 is void, in that it contains two subjects, and is obnoxious to the prohibition contained in section 3265 of the Revised Codes, which declares: " * * * No ordinance shall be passed containing more than one subject, which shall be clearly expressed in its title, except ordinances for the codification and revision of ordinances." This provision imposes the same restriction upon the city council as is imposed by the Constitution upon the legislature (Constitution, Art. IV, sec. 23), and the purpose is the same. This purpose is pointed out in *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, and the cases on the subject are there collated. The observance of the limitation is mandatory, and renders void any ordinance which violates it. But whatever is germane, incidental or necessary to the main or general subject of an ordinance may be included in it and is not a separate subject. (*State v. McKinney, supra.*) The general subject of ordinance 717 is the incurring of the indebtedness by the city. The different purposes named as making this necessary are matters of detail for the information of the taxpayers. The ordinance is not objectionable for the reason urged.

9. Is it incumbent upon the city council, in providing for the issuance of bonds for the purposes for which these bonds are proposed, to make them redeemable at the option of the city

council at a time prior to their maturity? The statute declares: "Sec. 3460. The bonds shall be made payable in not to exceed twenty years, and redeemable at such times as are prescribed in the ordinance directing their issue. Whenever at any time after such bonds become redeemable the sum in the sinking fund equals or exceeds one thousand dollars, the city or town treasurer must cause a notice to be published in one newspaper published in such city or town, that he will in thirty days from the date of such notice redeem said amount of the bonds which may then be payable, giving the number thereof, and calling for said bonds in their numerical order; and if at the expiration of said thirty days the holder of any bond thus called fails or neglects to present the same for payment, interest thereon must cease; but the treasurer must at all times thereafter be ready to redeem the same on presentation. Such notice must also be sent by mail to the bank of New York City which the treasurer has designated as the bank at which the bonds and the interest thereon will be paid."

Whenever a power is conferred upon a municipality, and the mode of its exercise is pointed out, this mode must be pursued. So the power to issue bonds redeemable and payable within a limit fixed by law must be pursued. (*Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *City of Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495.) The statute *supra* is mandatory in its provisions, both as to the term during which the bonds may run and as to the requirement that the council must reserve the option to redeem prior to maturity. The requirement in both these respects is a limitation upon the power to issue the bonds, and disregard of it in either would render them void. The purpose of the limitation as to the option to redeem is made manifest by the provision of the preceding section of the statute (3459) for the accumulation of a sinking fund, as well as by the mandatory provision in the latter part of the section itself, where it is made the duty of the treasurer, after such bonds have become redeemable, to

call them for payment in numerical order as soon as the sum of \$1,000 or more has been accumulated in this fund. Here is manifested unmistakably an intention by the legislature that after a reasonable time the sinking fund shall not accumulate, but as fast as possible be applied to the payment of the debt and *pro tanto* discharge it.

But it is said that the statute leaves it to the council to say in its discretion, in order to increase the salability of the bonds, when they shall be redeemable, and hence whether they shall be redeemable at all. If this be so, why may it not with equal propriety be said that the council may in its discretion, in order to make the bonds more salable, enlarge the time for which they may run before maturity? No one would say that the council has any discretion in this particular, and yet the language that imposes this limitation is of exactly the same import in enjoining the duty to make the reservation. If the whole matter is lodged in the discretion of the council, then the addition by the legislature of the mandatory requirements touching the provision for a sinking fund and the calling of the bonds is without significance. It is clear that the legislature intended that the council should use a reasonable discretion in fixing the time after which payment of the debt must begin, so that within reasonable limits it might be the exclusive judge as to the marketable quality of the bonds; but it most clearly was not the intention that the wise precaution against the accumulation of the sinking fund and the attendant danger of its loss from dishonest diversion or bad investment of it should be wholly disregarded. Ordinance 717, providing for the election, and the election notice given in pursuance of it, notified the taxpayers that the bonds voted would be redeemable as the statute provides. The bonds proposed to be issued in the form exhibited in Ordinance 747 show a distinct departure, both from the statute and from the ordinance, in the omission of the reserved option. Issued in that form, they would therefore be void.

10. It is said that the notice of election did not authorize the issuance of bonds to bear interest at five per cent payable semi-

annually, in that it described bonds to bear interest at a rate not to exceed five per cent per annum. The statute (Revised Codes, sec. 3455) provides that "the notice must state the time and place of holding the election, the amount and character of the bonds proposed to be issued and the particular purpose therefor." It does not require in terms that the rate of interest be stated; but assuming, without deciding, that this is implied, there is no requirement that it shall state the time of payment. The statute (Revised Codes, sec. 3459) fixes this; and it may be presumed that each voter understood that the time of payment stated in the bonds would be that fixed by the statute. But, however this may have been, the designation of the date of payment of the amount to fall due annually may not in any legal sense be regarded as a change in the rate. The fund out of which payment must be made would be provided by the annual levy of taxes. (Revised Codes, sec. 3459.) The fund thus provided would already be in the treasury when the time for payment of the semi-annual installment should arrive, and the stipulation in the bonds by which the payment of one-half of the amount due at the annual rate would be anticipated by six months, could not add anything to the burden assumed by the taxpayer. The case of *Skinner v. City of Santa Rosa*, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512, cited by counsel for respondent, is in point; but this case was overruled on the same point by the later case of *Murphy v. City of San Luis Obispo*, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444, and may not be regarded as authority.

11. It is argued that the council has no authority to issue bonds payable in "gold coin of the United States of America, of the present standard of weight and fineness." The people, it is said, by their vote authorized the issuance of bonds to a certain amount, in dollars; that dollars, cents and mills are the only monetary denominations known in this state, and that the amount named in dollars means lawful money of the United States. While this is true, it does not follow that, in the absence of legislation declaring otherwise, the city has no power to make

the bonds payable either in lawful money or in gold coin. The provisions of the statute authorizing the issuance of bonds such as these are silent upon the question as to the particular character of money in which they may be made payable, except that the treasurer must pay the interest coupons in lawful money of the United States. Whatever difference of opinion may have existed in the past on this subject, the controversy was authoritatively settled by the decision of the supreme court of the United States in *Woodruff v. Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973. In this case the question at issue in the state court was the validity of certain bonds of the levee board of Mississippi, district No. 1. The bonds upon their face acknowledged an indebtedness for gold coin of the United States, which the board for itself and successors promised to pay. The coupons were payable in currency of the United States. The state court held, as is contended here, that the bonds on their face were payable in gold coin only, and that, since the legislature authorized the board to borrow money generally, it intended money that constituted the basis of the general business of the country, and, since a contract to pay in gold coin could not be discharged in any of the different kinds of money having a legal tender quality, the bonds were void for want of power in the board to issue them. (*Woodruff v. Mississippi*, 66 Miss. 298, 6 South. 235.) The supreme court of the United States, however, held (1) that the bonds were not by specific promise made payable in gold coin, and (2) that, if such had been the case, they would nevertheless have been valid, because the statute authorizing their issuance was silent as to the particular kind of money in which they might be made payable, and that express and general power to issue negotiable bonds, in the absence of legislative restriction, carries the implied or incidental power to make them payable generally; that is, in currency which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured. The same conclusion was reached by the supreme court of Alabama in *Judson v. City of Bessemer*,

87 Ala. 240, 6 South. 267, 4 L. R. A. 742, and by the supreme court of Texas in *Winston v. Ft. Worth* (Tex. Civ. App.), 47 S. W. 740, in which the court collates the authorities.

12. Finally, it is said that Ordinances 747 and 748, passed and approved on March 1, 1909, providing for the issuance of the bonds, could not, under the provisions of the initiative and referendum law applicable to cities, become effective until April 1, 1909, and hence that the notice of sale, the publication of which began on March 2, 1909, could not be deemed sufficient to render the sale valid. The initiative and referendum provisions referred to are found in the Revised Codes (sections 3266 to 3276). In order that the referendum provision may be made available, section 3268 declares: "No ordinance or resolution passed by the council of any city or town shall become effective until thirty days after its passage, except general appropriation ordinances providing for the ordinary and current expenses of the city or town, excepting also emergency measures, and in the case of emergency measures the emergency must be expressed in the preamble or in the body of the measure, and the measure must receive a two-thirds vote of all the members elected." The argument is that since the ordinances could not be effective until April 1, the notice must be deemed to have been published without authority and to be abortive to give the officers of the city jurisdiction to sell the bonds at the date fixed in the notice. That this would be the result if the referendum provisions of the statute were applicable, we have no doubt; but upon a careful reading of them, we find that they have no application. They in terms apply, and were evidently intended to apply only, to matters of general legislation in which all electors without distinction may take an active interest. The question whether the council should have authority to issue bonds could be submitted to the taxpayers only. They had already exercised their prerogative reserved by the Constitution, under the provisions of the statute (Revised Codes, sec. 3259, and sections 3454 *et seq.*) and Ordinance 717. There is no provision for the submission to them of any other action taken by the council in pursuance of

the authority thus granted by them; nor is there any necessity that they should be consulted further. Their consent, given upon the submission of the primary question whether the debt should be incurred by the issuance of bonds, fully clothed the council with the power to issue and sell them according to the direction of the general statutes applicable. Furthermore, there being no special provision by which Ordinances 747 and 748 could be submitted to the taxpayers only, no submission of them could, under the general provisions, be made except to the electors generally, and a submission to them could not lawfully be made because it involved a question upon which they were not entitled to vote.

Several other questions submitted in the briefs we have not deemed of sufficient merit to require special notice. Many of those which we have deemed it necessary to notice were urged by counsel representing the respondent, and others by counsel who were allowed to appear for other taxpayers. We have referred to them generally, as urged by counsel for respondent.

The cause was submitted to the court on April 24, 1909. Since the time fixed for the notice of sale was May 1, and the time intervening between the date of submission and that date was too brief to permit us to put our views in writing, we deemed it advisable to announce our conclusion that the judgment of the district court should be affirmed, and defer the delivery of a formal opinion to a later date. This we did, and now give the foregoing statement of our reasons therefor.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: I concur in the result reached in this case and in all that is said by the Chief Justice, with this exception relative to paragraph 6 of the opinion, *videlicet*: I think the only legal method of procedure is to first obtain from the taxpayers a general consent to the project of raising the limit of indebtedness, and that the council should thereafter select the particular water supply. Any other construction of the law

will lead to the result that, if the council's first selection cannot be acquired, a new election will be necessary. And I foresee other complications. As this case was confessedly instituted to obtain a construction of the law (see *Carlson v. City of Helena*, 38 Mont. 581, 101 Pac. 163), I think the method of procedure above indicated should be declared to be, not only the orderly method, but the only legal method, to the end that the "Helena water controversy" shall be forever settled so far as the courts are concerned. If the matter is submitted to the taxpayers, as I think it should be, then in case the supply first selected cannot be obtained, the council may proceed to negotiate for some other, and so on, until the will of the taxpayers that the city shall own its own water supply is carried into effect.

Rehearing denied June 9, 1909.

COTTONWOOD DITCH CO., RESPONDENT, v. THOM, APPELLANT.

(No. 2,631.)

(Submitted May 5, 1909. Decided May 14, 1909.)

[101 Pac. 825.]

Quieting Title—Waters and Water Rights—Ditches Across Unoccupied Public Lands—Rights Acquired—Subsequent Homestead Entry—Decree—Injunctive Relief—Pleadings—Answer—Striking of Allegation.

Water Rights—Ditches Across Public Lands—Vested Rights—Subsequent Homestead Entry—Effect.

1. Where the construction of plaintiff's ditch over unoccupied public land was completed, and its predecessors in interest were in possession of it at the time defendant made a homestead filing on such land, the latter took the homestead subject to the right of way for the former's ditch (U. S. Comp. Stats., 1901, secs. 2339, 2340), even though water had not been appropriated or actually conveyed through it until after defendant's filing.

Same—Quieting Title—Decree—Injunctive Relief—When Proper.

2. Where, in an action to quiet title to the right of way for an irrigation ditch, the court found that the ditch and right of way therefor were the property of plaintiff and that defendant had wrongfully interfered therewith, it did not err in incorporating in its decree an order

restraining defendant from further interference. Plaintiff was entitled to complete relief.

Same—Pleadings—Answer—Motion to Strike.

3. Nor did the court err in striking from defendant's answer an allegation that defendant had received nothing on account of the construction of the ditch over his land, and that, if maintained, he would be damaged in a certain sum. Plaintiff's ditch having been completed before any rights of defendant to the land traversed by it had accrued, he suffered no injury because of plaintiff's continued use of the ditch, and no rights of defendant were violated.

Appeal from District Court, Carbon County; Sydney Fox, Judge.

ACTION by the Cottonwood Ditch Company against Charles Thom. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. W. L. Hyde, and Mr. Harry A. Groves, for Appellant.

Before any person can acquire any rights in a right of way over the public domain he must have a vested and accrued water right. The right of way is to be used in connection with the water right. It is simply incident thereto. (United States Rev. Stats., sec. 2339; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 243; *Nipple v. Forker*, 26 Colo. 74, 56 Pac. 578; *Taylor v. Abbott*, 103 Cal. 421, 37 Pac. 408.) An appropriation of water is not complete until the water is actually applied to a beneficial use. In this state if an appropriator fails to comply with sections 1886 and 1887 of the Civil Code, his water right vests only upon an actual application of the water to a beneficial use. If he complies with these sections, then his water right vests as of the date of posting the notice. (*Murray v. Tingley*, 20 Mont. 26, 50 Pac. 723.) After appellant made his filing, no ditch or right of way could be acquired over the same by respondent under the Act of 1866. (*Sturr v. Beck*, 133 U. S. 541, 33 L. Ed. 761.)

Mr. George W. Pierson, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

Action to quiet title to the right of way for a ditch, alleged to belong to the plaintiff, and for a perpetual injunction re-

straining the defendant from interfering with the ditch and the right of way therefor. The district court of Carbon county entered its decree in favor of the plaintiff adjudging it to be the owner of the ditch and the right of way therefor and restraining defendant from interfering therewith, and from such decree an appeal is taken.

It appears that plaintiff is a corporation, and its stockholders are land owners whose lands require water in order to raise crops thereon, and the ditch in question is designed to convey the waters of the Clark's Fork river for that purpose. It also appears that the defendant made a homestead filing on April 10, 1901; that the construction of the Cottonwood ditch was begun in June, 1899, and prosecuted with reasonable diligence; that the ditch was constructed and completed across the land now owned by the defendant, before he filed thereon, to-wit, in September, 1900, and the predecessors in interest of the plaintiff were in possession of the ditch and the right of way therefor when defendant made his filing; that in 1902, after defendant filed on his homestead, the predecessors in interest of the plaintiff filed a written notice of appropriation of water to be conveyed through the ditch, and first conveyed water across defendant's land, through the ditch in the same year; that since the fall of 1901 defendant has been in actual possession of the land filed on by him as a homestead "save and except land occupied by and as right of way of Cottonwood ditch." These matters appear from the court's findings of fact.

1. It is contended that plaintiff has no right in the land in question, for the reason that its predecessors in interest acquired no vested rights prior to the time when water was actually conveyed through the ditch for beneficial purposes, which was subsequent to the date of defendant's homestead filing. We are of opinion that this contention cannot be upheld. Section 2339, United States Compiled Statutes (1901, Vol. 2), reads as follows: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowl-

edged by the local customs, laws, and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." In 1870 section 2340 was enacted, as follows: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

It seems clear to us that the Congress, in these two sections, not only recognized and acknowledged all such vested and accrued water rights, including all ditches and reservoirs used in connection therewith, as were recognized and acknowledged by the local customs, laws, and decisions of the courts, and intended that all such rights should be maintained and the owners thereof protected (see *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240); but that, in addition thereto, it recognizes and acknowledges the necessity for the preliminary work of construction of ditches and canals, in preparation for the conveyance and use of water, and confirms, in the person engaged in such work of construction, on unoccupied public lands, before his right to the use of water has actually vested and accrued, a right of way in the land over which the ditch or canal is being constructed. In other words, that the Congress plainly acknowledges a right of way for the ditch or canal as fast as the work progresses and before water is turned in, and such acknowledgment, from so supreme authority, amounts to a grant of the right of way to those who, in good faith, prosecute the work of construction, over unoccupied public lands, with reasonable diligence to completion, for the purpose of applying the completed ditch or canal to a beneficial use. Plaintiff's ditch was completed across the land in question,

and plaintiff's predecessors were in possession of the same, at the time defendant made his homestead filing. This being so, it follows that defendant took his homestead subject to the right of way for plaintiff's ditch, and that the district court was correct in adjudging that plaintiff was entitled to have its rights confirmed and its title quieted.

2. But it is urged that the court erred in incorporating in its decree an order restraining the defendant from interfering with the plaintiff's ditch and right of way. We find no error in this action of the court. The findings disclose the fact that defendant has interfered with plaintiff's use of the ditch across his land. It became the duty of the district court to afford plaintiff complete relief from the wrongful acts of the defendant. As the ditch and right of way therefor are the property of the plaintiff, the defendant is not aggrieved by an order requiring him to refrain from interfering therewith. (*Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55.) Not only that, but the injunction order was a substantial part of the relief to which the plaintiff under the circumstances was entitled. The statute (section 6870, Revised Codes) gives the action to determine adverse claims to real property. Courts of equity have jurisdiction of the action. (*Montana Ore Pur. Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114.) Complete relief should be administered. (16 Cyc. 106; *Hamilton v. Fond du Lac*, 25 Wis. 490.) In the case of *Brooks v. Calderwood*, 34 Cal. 563, Chief Justice Sawyer, delivering the opinion of the court, said: "The very object of the suit was to determine whether the defendants had any just claim or title to the premises as against plaintiff, and settle the question forever. The court has determined that they have none, and we see no reason why it may not make its judgment effectual by restraining the defendants from further setting up a false claim. It has been judicially determined that defendants have no just claim, estate, or interest in a portion of the land, and, as to that portion, there is no reason why the plaintiff should be permitted to be further harassed by them." The purpose of the statute is

to compel a defendant who asserts an adverse claim to real property to come into court and have the matter finally determined, to the end that, if the claim is found to be invalid, it may be annulled and held for naught, and the plaintiff relieved from the annoyance, not only of the claim itself, if there is tangible evidence of its existence, but also of the assertion of the same, in future, by the defendant. (See 6 Pomeroy's Equity Jurisprudence, sec. 739.)

3. The defendant in his answer alleged, among other matters: That the ditch "described in plaintiff's complaint" was constructed across his land without his consent; "that defendant has received nothing whatever on account of the construction of said ditch, and if it is maintained his land will be damaged in the sum of \$500." The court on plaintiff's motion struck these allegations from the answer. In this we find no error. Appellant's counsel in his brief says in reference to this assignment of error: "In order that appellant could avail himself of this defense, it was necessary that he lose on the first. In other words, the defense is in fact in the alternative, saying that, if the first defense is insufficient, then, before the respondent should be allowed to recover, he should pay the damages to be suffered by appellant for the privilege of maintaining its ditch. This second defense was based upon the maxim that, 'He who seeks equity must do equity.' If the court should decide that respondent was entitled to the relief prayed for, before granting such relief he should compel the respondent to do equity; that is, to first pay appellant the damages past, present, and prospective, suffered because of the maintaining of said ditch." But this position cannot be successfully maintained, for the reason that plaintiff's ditch was fully completed across defendant's land before any rights of the defendant accrued, and, the court having determined that plaintiff was the legal owner of the ditch and the right of way therefor, no injury of which the defendant will be heard to complain was suffered by him on account of plaintiff's continued use of the ditch. The lawful maintenance and use of the ditch by its owner violate no rights of the defendant.

We have assumed that the damage claimed to have been sustained by appellant was occasioned by the original construction of the Cottonwood ditch. There is some reference in the answer and in the findings of the court to a ditch constructed by Rhodes and Hooper, or Rhodes and Ketcham; but as the testimony is not in the record, we are unable to determine that this ditch is not the same one which the court found was completed across defendant's land before he made his homestead entry.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing granted July 3, 1909.

ON REHEARING.

[Submitted October 5, 1909. Decided October 11, 1909.]

[104 Pac. 281.]

Waters and Water Rights—Ditches Across Public Lands—Rights of Way—Statutory Requirements—Noncompliance—Forfeiture.

1. The right of way for a ditch, granted to plaintiff's predecessors in interest by section 2339, U. S. Comp. Stats. 1901, over public land upon which defendant made a homestead filing after the ditch was completed, was not forfeited by failure of the grantees to comply with the provisions of sections 18, 19 and 20 of the Act of 1891 (U. S. Comp. Stats., 1901, p. 1570), relative to filing certificates, maps etc.

Messrs. Walsh & Nolan, and Mr. W. L. Hyde, for Appellant.

Mr. Geo. W. Pierson, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

After the decision on appeal in this case, May 14, 1909, counsel for the appellant filed a motion for a rehearing, calling the attention of the court, for the first time, to an Act of Congress dated March 3, 1891 (see section 2477, U. S. Comp. Stats. 1901, p. 1570), sections 18, 19, and 20 of which Act read as follows:

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may, hereafter file, with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the secretary of the interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this Act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed,

whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the secretary of the interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this Act from the date of their filing, as though filed under it: *Provided*, that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

A rehearing was granted, and the cause has been reargued. The contention of the appellant now is that, having failed to comply with the provisions of the Act of 1891, the respondent and its predecessors acquired no right of way for their ditch across the land in question, for the reason that, before water was actually conveyed through the ditch, the homestead rights of appellant had attached. The respondent argues (1) that the Act of 1891 has no reference to small enterprises like the construction of its ditch, which is only seven miles long; and (2) that a failure to comply with the provisions of the Act of 1891 cannot be taken advantage of by a private person, but is a matter which concerns the federal government alone. A history of the causes which impelled the passage by the Congress of the Act of 1891 would doubtless throw considerable light upon the question of the proper construction to be placed upon that piece of legislation, but we do not deem it necessary to make the investigation. We are still of opinion that section 2339, U. S. Comp. Stats. 1901, granted a right of way for the construction of ditches across the public domain, and that the respondent's

rights, acquired by virtue thereof, were not forfeited by a failure to comply with the provisions of the Act of 1891.

We, therefore, adhere to our original decision.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY,
CONCUR.

**METTE & KANNE DISTILLING CO., APPELLANT, v. LOW-
 REY ET AL., RESPONDENTS.**

(No. 2,642.)

(Submitted May 6, 1909. Decided May 22, 1909.)

[101 Pac. 966.]

*Sales—Delivery to Carrier—Transfer of Title—Action to Re-
 cover Price—Burden of Proof—Evidence Admissible Under
 General Denial—Theory of Case—Witnesses—Oath—Evi-
 dence on Former Trial—Admissibility—Presumptions.*

Sales—Transfer of Title—Delivery to Carrier.

1. When goods ordered in the ordinary course of trade are not directly delivered to the purchaser, but are turned over to a carrier for delivery, title to them is deemed to be vested in the vendee, subject to the right of stoppage *in transitu*. The latter, on receipt of them, has a reasonable time within which to inspect them, and he is bound to accept them only when they are in quality and description such as the purchaser ordered.

Same—Action for Price—Burden of Proof.

2. One who seeks to recover the contract price of goods shipped on order is bound to show by a preponderance of evidence that they are of the kind and quality ordered.

Same—Evidence—Admissibility.

3. On an issue whether whisky was of the brand and quality ordered, the defendant buyer was properly permitted to show that the barrels containing it were received by him in apparently the same condition as when shipped, and that they had not been tampered with after being stored in his cellar or their contents adulterated.

Witnesses—Evidence on Former Trial—Admissibility.

4. The testimony of a witness, given at a former trial in an action between the same parties and relating to the same subject matter, who was out of the jurisdiction at the time of the second trial, was competent.

Appeal and Error—Evidence—Objection not Made in District Court.

5. An objection to the introduction of testimony not made in the district court cannot be raised for the first time on appeal.

Evidence—Witnesses—Administering of Oath—Presumptions.

6. Where it appeared that a witness in a justice's court, in an action subsequently appealed to the district court, had been examined and cross-examined at length, the presumption attaches that the justice regularly performed his official duties and administered the oath to the witness before permitting him to testify.

Verdict Contrary to Law—Instructions.

7. A verdict cannot be said to be contrary to the law as declared by the court, where under its instructions the jury could have found the issue for either party.

Sales—Action for Price—General Denial—Evidence Admissible.

8. In an action for the price of goods to be shipped on order, proof that the plaintiff failed to ship goods of the quality ordered is admissible under a general denial.

Same—Appeal—Theory of Case.

9. Where a cause was tried on a theory adopted by plaintiff's counsel, he will not be heard to complain on appeal that such theory was wrong.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the Mette & Kanne Distilling Company against Thomas M. Lowrey and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Binnard & Rodgers, for Appellant.

The delivery of goods to a common carrier for transportation passes the title in the property to the consignee, and any subsequent change in the quality of said goods which entails damage or loss must be borne by the consignee. (22 Cyc. 1631; *United States v. Orene Parker Co.*, 121 Fed. 596; *United States v. Adams Express Co.*, 119 Fed. 240; 1 Mechem on Sales, 739; *Brockway v. Maloney*, 102 Mass. 308; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Willman Merc. Co. v. Fussy*, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738.)

The court erred in permitting the stenographer to read the testimony of the absent witness Juescke had in the justice's court. The showing as to the efforts of defendants to procure his attendance was insufficient. (*Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175; *Wilbur v. Selden*, 6 Cow. 164; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174; *Berney v. Mitchell*, 34 N. J. L. 341; *Le Baron v. Crombie*, 14 Mass. 234; *Lipscomb v.*

Lyon, 19 Neb. 511, 27 N. W. 731; *Weeks v. Lowerre*, 8 Barb. 530; *Mutual Life Ins. Co. v. Anthony*, 50 Hun, 101, 4 N. Y. Supp. 501; *Gastrell v. Phillips*, 64 Miss. 473, 1 South. 729; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.)

The answer of defendants having been a general denial, it was insufficient to admit evidence tending to show that plaintiff had not performed the contract by shipping the goods ordered. New matter constituting a defense or counterclaim must be specially pleaded. (4 Current Law, 1049; *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847; *Rucker v. Bolles*, 133 Fed. 858, 67 C. C. A. 30; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409; *Iba v. Central Assn. etc.*, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20; *Penn Mutual Life Ins. Co. v. Ornauer*, 39 Colo. 498, 90 Pac. 846; *Taxier v. Gouin*, 5 Duer (N. Y.), 392; *Winkeer v. Roeder*, 23 Neb. 706, 8 Am. St. Rep. 155, 37 N. W. 607; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337.)

Mr. James E. Murray, for Respondents.

Where a seller relies on the contract in an action for the price, he must prove that he performed it by delivering goods of the quantity and quality of the article ordered. (*Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Flint v. Lyon*, 4 Cal. 21; *Haase v. Nonnemacher*, 21 Minn. 486; *Wolf v. Dietzsch*, 75 Ill. 205; *Woods v. Miller*, 55 Iowa, 168, 39 Am. Rep. 170, 7 N. W. 484; *Maxwell v. Kellogg*, 55 Mich. 606, 22 N. W. 60; *Bruce v. Pearson*, 3 Johns. 534; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Viall v. Hubbard*, 37 Vt. 114.) Where goods ordered by a particular description are sent by common carrier, the buyer may receive them to see if they answer the order, and there can be no acceptance as long as the buyer consistently refuses to accept them as not answering the description of the goods ordered. (*Elliot v. Howison*, 146 Ala. 568, 40 South. 1018; *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515.) If the goods are different from the goods ordered, the buyer may refuse to accept them. (*Hutchinson Co. v. Dickerson*, 127 Ga. 328, 56 S. E. 491;

Parkins v. Missouri Pac., 76 Neb. 242, 107 N. W. 260; *Armstrong v. Columbia Co.* (Del.), 66 Atl. 366; *Ward Furniture Co. v. Isbell Co.*, 81 Ark. 549, 99 S. W. 845; *Jones v. Blomgarten*, 143 Mich. 326, 106 N. W. 891; Tiedeman on Sales, sec. 197.) The common carrier is not the agent for the purpose of acceptance, but merely for delivery. (*Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393.) The seller must prove not only delivery, but acceptance in order to show an executed sale. (*Greenleaf v. Gallagher*, 93 Me. 549, 74 Am. St. Rep. 374, 45 Atl. 829; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176.)

Under a general denial, any matter may be given in evidence which shows that the plaintiff never had any cause of action. This would not constitute new matter. Ultimate facts only should be pleaded. The appellant pleaded ultimate facts and the denial throws upon the plaintiff the burden of proof. (See *Helena Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 831; *Cook & Woldson v. Gallatin Co.*, 28 Mont. 509, 73 Pac. 131.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action originated in a justice's court of Silver Bow county, and was brought to recover from King & Lowrey, copartners, \$182.18, balance alleged to be due on account. The complaint alleges: That the plaintiff, at Butte, Montana, on the — day of October, 1905, sold to defendants, and thereafter delivered to them, at their request, f. o. b. St. Louis, Mo., two barrels of Meadeville rye whisky, one barrel of California sherry, and one barrel of port wine; that defendants agreed to pay for the same the sum of \$258.31 on or about January 9, 1906, but that they have not paid any part of said sum, except \$76.13, leaving the said balance unpaid. The answer denies generally all the allegations of the complaint. In the justice's court plaintiff

had judgment. The defendants appealed to the district court. Pending the appeal the defendant King died. Defendant Lowrey, having been appointed executor of his will, was by an order of substitution by the district court made defendant in his representative capacity also. The trial in that court resulted in a verdict and judgment for defendants. Plaintiff has appealed from the judgment and an order denying it a new trial. The goods in controversy were ordered on October 5, 1905, by defendant Lowrey for the firm of King & Lowrey, who were conducting a saloon in Butte, through one Amba, a traveling salesman in the employ of plaintiff. They were to be shipped at once, and, as the parties understood, f. o. b. at St. Louis, the plaintiff delivering the bill of lading to the defendants. There is no dispute but that goods, including the items named in the order and ostensibly of the brand and quality specified, were shipped by plaintiff on October 9, 1905, and were received by King & Lowrey, apparently in good order, on October 18 and properly stored in their cellar. The barrels were then all apparently in the same condition as when shipped. Nor is there any controversy touching the quality of the wines. They were paid for at the time the bill fell due and are not involved in this case. Some time after the whisky was received, and after it had been allowed to settle so as to be fit for use, no one in the meantime having had access to the cellar but Lowrey and the employees of the place, the barrels were opened, whereupon the barkeepers discovered that the whisky was of an inferior quality. Lowrey thereupon, on December 6, wrote the plaintiff as follows: "Your invoice of October 9 came all O. K. and the rye whisky is very unsatisfactory, seems to be a little musty, and cannot use it. Please advise us what to do with it." Considerable correspondence thereafter took place between the parties; the plaintiff insisting that it had filled the order properly by shipping Meadeville rye whisky, and that, if there was anything wrong with it, this condition was due to tampering by some one, probably the employees of King & Lowrey, after it had been received. Lowrey insisted that the whisky was not

Meadeville rye whisky, and finally notified the plaintiff that the firm would not pay for it and that it was held subject to plaintiff's order. The issue made in the evidence at the trial was whether the whisky shipped by plaintiff was of the brand and quality ordered, and this was the only question submitted to the jury. The trial was had upon the theory that the contract was an entirety for the sale of the whisky only.

The assignment is made in appellant's brief that the evidence is insufficient to sustain the verdict, but in the portion of it devoted to the argument no reference is made to the assignment. We assume, therefore, that this assignment was abandoned, and notice those only upon which appellant relies.

1. Assuming that the evidence conclusively shows that goods of the kind and quality ordered were delivered to the common carrier at St. Louis, appellant insists that the title then passed to King & Lowrey, and that any loss or damage due to subsequent change in their condition must be borne by the latter. The rule contended for by appellant is elementary. "The effect of the delivery to the carrier under proper circumstances is thus not only to transfer the title, but also to fix ordinarily the time and place at which the title passes. With the title go the risk and liability, and the seller may recover the price though the goods never arrived, or, without his fault, are injured on the way." (1 Mechem on Sales, sec. 739.) In *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787, the rule is stated thus: "When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or when no agreement is made or direction given, to be transported in the usual mode, or when the purchaser, being informed of the mode of transportation, assents to it, or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected, the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in

him, subject to the vendor's right of stoppage *in transitu*." It is recognized by the courts generally. (*Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338; *First National Bank v. McAndrews*, 5 Mont. 325, 51 Am. Rep. 51, 5 Pac. 879; *Walsh v. Blakely*, 6 Mont. 194, 9 Pac. 809; *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Sarbecker v. State*, 65 Wis. 171, 56 Am. Rep. 624, 26 N. W. 541; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; 24 Am. & Eng. Ency. of Law, 2d ed., 1061; Benjamin on Sales, 7th ed., sec. 693.) Respondent does not contend that the rule is otherwise; but the question here is, not whether plaintiff delivered goods to the carrier for King & Lowrey, but whether it delivered the goods of the particular description ordered, to-wit, two barrels of Meadeville rye whisky. Having based its claim upon the express contract, the plaintiff was bound to show by a preponderance of the evidence that it had complied with its engagement, or be cast in the action, for, although it showed that it delivered other goods of the same general character, but of a different quality or description, this was not proof that it had delivered the particular quality of goods ordered. A failure to deliver the goods ordered is a failure to make delivery according to the contract, which precludes recovery upon it. (2 Schouler on Personal Property, sec. 396; Benjamin on Sales, 7th ed., sec. 600; 2 Mechem on Sales, sec. 1154.) The carrier is the bailee of the purchaser for the purpose of accepting delivery, but not to determine that the goods are in quality and description such as the purchaser ordered. The latter has the right of inspection after delivery to him by the carrier, and may take a reasonable time for that purpose. (Benjamin on Sales, 7th ed., 734; *Black v. Delbridge etc. Co.*, 90 Mich. 56, 51 N. W. 269; *Schiller v. Blyth & Fargo Co.*, 15 Wyo. 304, 88 Pac. 648, 8 L. R. A., n. s., 1167; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393.) He is bound to accept only when the seller has tendered the thing contracted for. The right of inspection, however, does not change the rule that delivery will be held to have been

made to the purchaser at the time of shipment and at his risk during transit. As heretofore stated, the sufficiency of the evidence as to the quality of the two barrels of whisky shipped is not challenged. Under proper instructions the court submitted to the jury the question at issue, to-wit, whether the whisky was Meadeville rye whisky. They found that it was not. This concludes plaintiff, unless the court was in error in its rulings upon questions of evidence.

2. The evidence on the part of the plaintiff tended to show that the shipment was strictly in compliance with the order. Defendant, in order to rebut this *prima facie* case, was permitted, over plaintiff's objection, to introduce evidence tending to show that the barrels containing the whisky were received apparently in the same condition as when shipped; that they were put into defendants' cellar and properly stored; that the cellar was kept locked so that no person but the proprietors, King and Lowrey, and their employees, could have access to them; that, after they remained there long enough to allow the whisky to get into condition for use, they were opened, whereupon it was found that they contained an adulterated liquor of a quality entirely different from Meadeville rye whisky; and that the adulteration could not have been accomplished except at some place where there were facilities for that purpose. This evidence also tended to show that the barrels had not been tampered with after they reached the cellar. All of it was objected to on the ground that it was immaterial and irrelevant, in that it did not tend in any way to show that the plaintiff had not shipped the quality of whisky ordered. The objection was properly overruled. The quality of the whisky when it was received was evidence of its quality at the time of its shipment; the proof on this point being materially aided by the fact that the barrels had not thereafter been tampered with while in charge of the carrier or after their arrival in Butte, as well as by the additional fact that the contents had not been adulterated as they were found to have been after their receipt in Butte.

3. Herman Jueschke was employed as a porter by King & Lowrey at the time the whisky was received by them, and stored the barrels in the cellar. At the trial in the justice's court, he was examined as a witness for defendants. Pending the appeal he left the state of Montana, and at the time of the trial in the district court was residing at Tonopah, Nevada. These facts having been shown, the witness Riley, a stenographer of experience who had taken stenographic notes of the evidence of Jueschke in the justice's court, after stating that his notes contained a correct report of the testimony, was permitted to read them to the jury, over the objection of counsel that the evidence was incompetent, in that it did not appear that the witness was out of the state. It is argued now that the evidence was incompetent also upon the further ground that it did not appear that the witness had been sworn in the justice's court. The statute (section 7887, Revised Codes) declares: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * (8) The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter." To render the evidence competent, it was necessary for it to appear that the witness had theretofore been examined in a former controversy between the same parties, relating to the same subject matter, and that he was at the time of the trial, either (1) dead, or (2) out of the jurisdiction, or (3) unable to testify. (*Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.) The objection being exclusively upon the ground that it did not appear that the witness was out of the jurisdiction, it was met and removed by the evidence of a witness who stated that he knew of his own knowledge of the whereabouts of Jueschke, that he was then residing at Tonopah, Nevada, and that he had not been in the state of Montana since his removal therefrom, some months before. The objection that it did not appear affirmatively that the witness had been sworn by the justice was not made in the district court, and may not be considered here; but, even so, it appeared that he had been called on behalf of the defendants

and had been examined and cross-examined at length. It would seem that the presumption ought to attach that the justice regularly performed his official duty. The briefs contain some discussion of the question whether the stenographer should have been allowed to read his notes, or have been required to speak from memory, and to use his notes only as an aid. The propriety of the method pursued in this regard was not called in question at the trial. It is now too late to question it.

4. The court, among other instructions of like import, submitted the following: "(3) the court instructs the jury, as a matter of law, that where goods are delivered to a common carrier for transportation over its line, and the contract of purchase is silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee." It is argued that, since it appeared that a delivery of the goods ordered by King & Lowrey was made to the carrier, the said bailee, in accordance with the understanding of the parties, the jury could not properly have found for the defendants at all under this instruction, and hence that the verdict was contrary to the law as declared by the court. This contention is without merit. As already pointed out, while the carrier was the agent of the defendants to accept delivery of the goods, it was not their agent to approve the quality of them. The contract remained so far executory, after delivery to the carrier, that the defendants were not bound by it until they had received goods of the quality and description ordered. Whether the plaintiff shipped such goods was the only question at issue. Under the instruction the jury could have found the issue either way. Their verdict was therefore not contrary to the law.

5. Contention is made that the answer of the defendants, being a denial only, was not sufficient to admit evidence tending to show that the plaintiff had not performed the contract by shipping the goods ordered. The point made is that, if plaintiff failed to ship goods of the quality ordered, it was guilty of a breach of warranty, and that defendants could not rely upon

this defense without specially pleading it. There was no question of breach of warranty involved. (Benjamin on Sales, 7th ed., sec. 600.) The plaintiff relied upon the contract. In order to recover it was bound to show that it had delivered the goods as it had engaged to do. (*Stotesbury v. Power*, 27 Mont. 469, 71 Pac. 675.) Defendants' denials were all that were required to put the burden upon the plaintiff; but, were the rule otherwise, the case was tried upon the theory adopted by plaintiff's counsel in the court below. It cannot now insist that this theory was wrong.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. GATTAN, RELATOR, v. DISTRICT COURT,
RESPONDENT.

(No. 2,716.)

(Submitted May 10, 1909. Decided May 22, 1909.)

[101 Pac. 961.]

Physicians and Surgeons—Revocation of License—Appeal to District Court—Special Proceeding—Appeal to Supreme Court—Certiorari.

Physicians and Surgeons—Revocation of License—Special Proceeding—Appeal.

1. The application of a physician to the district court to have the action of the state board of medical examiners, in revoking his license for alleged unprofessional and dishonorable conduct, judicially determined, is a special proceeding, from the judgment in which an appeal lies to the supreme court.

Same—Revocation of License—Failure to Appeal—Certiorari.

2. Where a physician fails to avail himself, within one year after entry of judgment, of the remedy by appeal, from the action of the district court in affirming the revocation of his license by the state board of medical examiners, he may not thereafter have it reviewed on certiorari.

Certiorari—Error Within Jurisdiction.

3. Error within jurisdiction is not reviewable on certiorari.

WRIT OF REVIEW by the state, on the relation of Ferdinand Gattan, against the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow. Dismissed.

Mr. E. S. Booth, and Mr. B. S. Thresher, for Relator.

Mr. Albert J. Galen, Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The relator was prior to November 23, 1907, a physician duly licensed by the state board of medical examiners, residing and practicing his profession in Silver Bow county. Complaint having been made to the board while sitting in Silver Bow county that he had been guilty of unprofessional and dishonorable conduct, a trial was had, with the result that the board revoked his license. Thereupon he appealed to the district court of Silver Bow county. On November 23, 1907, a trial was had by that court with a jury of six physicians in conformity with the provisions of the statute. (Revised Codes, sec. 1588.) The trial resulted in a verdict finding the charges sustained and affirming the judgment of the board of examiners, and judgment was by the court entered accordingly. The relator has filed in this court his application for a writ of review to annul the judgment so entered against him. It is alleged that the district court was without jurisdiction to render and enter it, because the jury selected to try the charges was not a legal jury, in that the names of the persons constituting it were not drawn from the regular jury-box in conformity with the provisions of law on the subject, but that the jurors were selected under arbitrary order and direction of the court, and that the jury, as constituted, consisted of six persons only, whereas the relator was entitled to have the issue involved tried by a constitutional jury of twelve persons, drawn and impaneled as provided by law for all actions and pro-

ceedings in the district court. The application must be denied for two reasons:

1. The relator had a right of appeal from the judgment. Judicial remedies are distinguished into two classes—actions and special proceedings. (Revised Codes, sec. 8078.) “An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” (Section 8079.) “Every other remedy is a special proceeding.” (Section 8080.) While proceedings had under the law before the board of medical examiners touching the granting or revoking of a license may not in any sense be regarded as the administration of a judicial remedy, an appeal to the district court from one of its determinations, whereupon a trial of the issue is had *de novo*, must be regarded as an application to that court for a judicial remedy. The appeal is granted as a method of getting the matter involved before a court that it may be determined judicially. (*Board v. Heaston*, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212.) And, since the application is made by means of the appeal, instead of by the filing of a complaint—the only method of beginning an action—the remedy thus furnished must be classified as a special proceeding. If it cannot be so classified, it is not subject to classification. We hold that it is a special proceeding commenced in the district court by the filing of the appeal. In all such proceedings the party aggrieved has an appeal to this court, provided he avail himself of his right within one year. (Revised Codes, secs. 7098, 7099.) He may not permit the time for appeal to lapse and then have the judgment reviewed and annulled on writ of review.

2. The application does not question the jurisdiction of the district court to entertain the appeal. The only question made with reference to the proceedings there is as to the action of the court in selecting the jury. Its action in this regard, if erroneous, amounted only to error within jurisdiction and cannot

be corrected by writ of review. The application is therefore dismissed.

Dismissed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

HALE, APPELLANT, v. COUNTY OF JEFFERSON ET AL., RESPONDENTS.

(No. 2,609.)

(Submitted May 7, 1909. Decided May 22, 1909.)

[101 Pac. 973.]

Taxation—Ditches Appurtenant to Placer Claims—Exemption—Burden of Proof—Estoppel.

Appeal—Dismissal—Record.

1. An appeal from an order denying a new trial will be dismissed where a copy of the order denying the motion is not incorporated in the transcript.

Taxation—Ditches Appurtenant to Placer Claims—When Exempt.

2. *Held*, that a ditch, appurtenant to placer claims, which had always been used to convey water for mining such claims, and for no other purpose, and which, independently of such use, had never been the source of revenue to its owner, although the water could be sold for irrigation and other purposes and would be valuable in this connection, had no value independent of its use in connection with the placer lands so as to render it subject to taxation under section 2500, Revised Codes.

Same—Exemption—Burden of Proof.

3. One claiming an exemption from taxation has the burden of showing that he is entitled to it; but in an action to enjoin the collection of taxes upon a ditch used solely in connection with placer mining operations and therefore not subject to taxation, the burden rests upon the state to show that the ditch has a value independent of the placer mining claim, so as to render it liable to taxation as provided in section 2500, Revised Codes.

Same—Exemption—Estoppel.

4. Though the owner of the ditch referred to in the paragraphs above, had for many years submitted to the payment of taxes thereon upon a valuation fixed by himself (because demanded by the assessor), he was not estopped to question the right of the state to continue to make the unauthorized imposition.

39	137
41	519

Appeal from District Court, Jefferson County; Lew L. Callaway, Judge.

INJUNCTION by Robert S. Hale against the county of Jefferson and others. From a judgment for defendants, and an order denying motion for new trial, plaintiff appeals. Reversed and remanded.

Mr. Massena Bullard, and Mr. Wm. Wallace, Jr., for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought on May 3, 1906, to obtain an injunction to restrain the defendant county of Jefferson, its commissioners, and treasurer from including in the assessment-roll of taxable property for that year a certain ditch owned by plaintiff, and from levying and collecting taxes thereon. The issues made by the pleadings present the one question, to-wit, whether this property is subject to taxation under the provisions of the Constitution declaring what property is taxable, and the statute enacted in pursuance thereof, as having a value independent of placer lands to which it is appurtenant. The cause was tried by the court upon an agreed statement of facts, which, omitting the formal parts, stipulating the capacity of defendants, is the following:

“That during all the times mentioned in the complaint herein the plaintiff was and is the owner by purchase from the United States of certain placer mining claims in Lewis and Clark county, Mont., aggregating about five hundred (500) acres, no part of the surface ground of which claims or any part thereof is used for other than mining purposes, or has a separate or independent value for [other] than mining purposes, and

that, upon all of said placer mining claims, the plaintiff has for many years paid and continues to pay all taxes levied or assessed against said mining claims and each thereof as provided by law.

"(4) That plaintiff is, and for many years last past has been, the owner of a certain mining ditch known as the Park ditch, which ditch is used to convey certain waters to said mining claims for use in working, operating and developing said mining claims, and that said ditch is property and surface improvements appurtenant to said mining claims.

"(5) That a portion of said ditch is situate in Jefferson county, Mont.; said portion being about fourteen miles in length.

"(6) That plaintiff has never made any use of the said Park ditch, or of the waters conveyed thereby, other than for mining purposes upon his said mining claims, and does not receive and never has received any revenue or money from said ditch, or the waters conveyed thereby, save and except as the result of his use of said ditch and water upon said mining claims. That plaintiff has never sold or conveyed any part of said ditch, or the waters conveyed thereby, and makes no use whatever of said ditch or waters conveyed thereby separate or independent of said mining claims.

"(7) That the defendants have during many years last past against the protest of the plaintiff caused said ditch to be assessed for purposes of taxation, and required plaintiff to pay taxes thereon each year under threats by said defendants to sell said ditch at tax sale if the taxes assessed and levied against said ditch should not be paid. That, at the time of the commencement of this action, the county assessor of Jefferson county had assessed that portion of said ditch situate in Jefferson county for the purpose of taxation for the year 1906, and it was the intention of the said county commissioners to levy taxes against said ditch for said year 1906, and it was the intention of said county treasurer, if the taxes as assessed and levied against said ditch had not been paid, to advertise said ditch for sale for delinquent taxes, and to sell or attempt to sell said ditch at tax sale for the taxes so assessed and levied, and that, unless so re-

strained and enjoined, the said defendants will assess said property for the purposes of taxation and levy taxes thereon for the years 1906 and 1907, and said county treasurer will, if the taxes so assessed and levied against said ditch shall not be paid, advertise said ditch for sale for delinquent taxes, and will sell or attempt to sell the said ditch at tax sale for the years 1906 and 1907.

“(8) That plaintiff has for many years last past listed said property for taxation, and for said purposes has valued the same as high as eight thousand dollars (\$8,000). That said property was not listed for taxation by said plaintiff voluntarily, but that it was so listed because the plaintiff was demanded to list the same by the assessor of Jefferson county, and that the taxes paid thereon were paid by plaintiff under protest. That plaintiff was not fully advised as to his legal rights and listed said property for taxation because so demanded, and because it seemed to him for the time being to be better to list the same than to be put to the expense, delay, and vexation of litigation for the purpose of securing an adjudication of his legal rights. That in listing said property for assessment and placing a value thereon the plaintiff never at any time made any statement [that] the property had a value separate and independent of his mining claims.

“(9) It is further stipulated and agreed that the said Park ditch and water right could be made available for, and might be sold for and used for, irrigation [irrigating?] farms, and for various other purposes if the plaintiff so desired, and that said ditch and water right would be valuable for such purposes if devoted thereto.

“Each party reserves the right to object to the admissibility, relevancy, and competency as evidence of any of the facts hereinabove stipulated; this stipulation being for the purpose of conceding that the facts as herein recited are facts and to be so considered if proof thereof would be admitted under objections if offered on the trial.”

Upon these facts, the district court concluded that the property had an independent value, and was therefore taxable upon

such value. Accordingly it denied the relief sought, and entered judgment for defendants for their costs. Plaintiff has appealed from the judgment and an order denying his motion for a new trial.

1. Upon examination of the transcript of the record we do not find incorporated in it a copy of the order denying the motion for a new trial. The appeal from the order is accordingly dismissed.

2. Nevertheless, the question whether the court drew the correct legal conclusion from the agreed statement, which constitutes its finding of facts (Revised Codes, sec. 6769), is properly before us for determination upon the judgment-roll (Revised Codes, secs. 6799, 6806). Apart from certain exemptions specifically mentioned, all property in the state is subject to taxation. (Constitution, secs. 1, 3, Art. XII.) Touching mines and mining claims, the Constitution declares: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law." (Section 3, Article XII.) Section 2500, Revised Codes, relating to the taxation of mines, after declaring that mines and mining claims shall be taxed as prescribed in the Constitution, provides: "All property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims * * * shall be taxed as other personal property."

Under the stipulated facts, the ditch in controversy is appurtenant to the placer lands belonging to the plaintiff. It has always been used to convey water for the purpose of mining them. It has never been used for any other purpose, nor has it ever been, independently of them, a source of revenue to plaintiff. Together with the water conveyed by it, it could be sold and used for irrigating farm lands and for other purposes, and it would be valuable for these purposes. Do these facts show that it has a value independent of its use in connection with the mining claims within the meaning of the provisions of law *supra*? Viewed as independent property rights, ditches and the right to use the water conveyed by them are property subject to taxation; but, when made appurtenant to lands, they have no independent use. So situated and used, the value of this species of property enters as an element into the value of the *corpus* or principal estate to which it is attached or appurtenant, and bears its proportionate burden of taxation by the added taxable value which it gives to the principal estate. If it had an independent use yielding independent profit, it should be taxed according to its value for that purpose, and the value for that purpose would be determined by the amount of profit. "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property; but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use." (*Cleveland etc. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041.) To illustrate: A ditch and water right, attached to agricultural lands, add a large element of value to them, by contributing to their productiveness, which, in turn, determines their actual value. They are taxed when the lands are taxed upon their value thus increased. They may not be taxed as having an additional independent value because they could be used to furnish water to

supply the inhabitants of a city, and thus be made to yield a large profit. So the land occupied by the ditch in controversy here is not owned by the plaintiff. The plaintiff's interest is a mere right of way, an easement in the land over which the ditch passes, which is attached to the plaintiff's mining lands. These lands, being assessed at a value fixed by the Constitution, and therefore not capable of being enhanced in value by the use of the ditch bringing water upon them, are nevertheless rendered productive by such use, and thus yield an additional value which is subject to taxation, to-wit, the annual net proceeds. Without the ditch and water, the lands are arbitrarily taxed at the government purchase price. With them put to profitable use the lands become a source of revenue to the owner, and at the same time make an additional contribution to the revenues of the state. The parallel is not exact, but sufficiently exact to demonstrate what was designed by the constitutional convention when it adopted the provision *supra*, which was to encourage the acquisition and profitable development of mines by requiring the owners to pay taxes upon the annual net proceeds or profits only, in addition to the cost of acquisition, the water rights and ditches used in connection with them being not otherwise taxable, unless they can be shown to have an independent value by reason of profitable use for some other purpose.

One claiming an exemption must sustain the burden of showing that he is entitled to it. In such a case as this, however, the burden is upon the state to show that the independent value exists, and that it is entitled to impose the tax. The facts stated are not sufficient to warrant the conclusion reached by the district court; for, though the plaintiff has heretofore submitted to the payment of taxes upon a valuation fixed by himself upon the ditch, he is not estopped to question the right of the state to continue to make the unauthorized imposition.

The judgment is reversed, and the cause is remanded to the district court, with directions to grant the injunction.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

HALL, RESPONDENT, v. BUTTE ELECTRIC RAILWAY CO.
ET AL., APPELLANTS.

(No. 2,652.)

(Submitted May 7, 1909. Decided May 23, 1909.)

[101 Pac. 965.]

Appeal—Dismissal—Faulty Record.

1. Where the record on appeal in an action against three defendants showed a judgment against one only, and a joint notice of all defendants recited that they intended "to move the court to vacate the verdict rendered against them, and to grant a new trial thereof," while the order of the court denying the motion referred to only one of defendants, the attempted appeals will be dismissed. (MR. JUSTICE SMITH dissenting.)

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Edward Champion Hall against the Butte Electric Railway Company and others. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Mr. W. M. Bickford, and Mr. Geo. F. Shelton, for Appellants.

Messrs. Mackel & Meyer, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The action was commenced against the Butte Electric Railway Company, John Zurfluh, and P. J. Donohue. The defendants first appeared jointly by general demurrer, which was overruled. They then jointly answered. The cause was tried to the court sitting with a jury. The verdict returned is as follows: "We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendant Butte Electric Railway Company for the sum of \$1,000, besides costs of action." The judgment, after reciting the verdict, proceeds: "Where-

fore, by virtue of the law and by the reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff, Edward Champion Hall, have and recover from the said defendant, Butte Electric Railway Company, a corporation, the sum of one thousand (\$1,000) dollars, with interest thereon at the rate of eight per cent per annum from date until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of ———." Defendants jointly gave notice of intention to move for a new trial, in which they say that they "intend to move the court to vacate *the verdict rendered against them*, and in favor of the plaintiff, in the above-entitled cause, and to grant a new trial thereof." The only order found in this record denying a motion for a new trial is the following: "This day the defendant Butte Electric Railway Company's motion for a new trial is by the court denied." The defendants jointly appeal, and in their notice they recite that they appeal "from the judgment therein rendered by the district court of the second judicial district of the state of Montana, in and for the county of Silver Bow, on the seventeenth day of March, 1908, and entered on the seventeenth day of March, 1908, in favor of the plaintiff *and against the defendants*, and from the whole thereof, and also from the order of said court, made and entered on the twenty-ninth day of August, 1908, overruling the said *defendants' motion* for a new trial, and from the whole thereof."

The foregoing statement—which appears to be the only fair statement to be had from the record before us—demonstrates at once that this court cannot consider either appeal upon the merits. There is not any such judgment in the record as the one from which the appeal is attempted to be taken. The attempted appeal is from a judgment rendered against all three defendants, while the only judgment found in the record is a judgment against the Butte Electric Railway Company only. The same thing is true with respect to the order denying a new trial. This record wholly fails to show that any appeal has ever been taken from the judgment or order found in this record.

while the judgment and order from which the appeals purport to have been taken are not in the record. There is, therefore, not anything before us which we can consider, and for this reason each of the pretended appeals is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE SMITH DISSENTS.

KAUFMAN, RESPONDENT, v. COOPER ET AL., APPELLANTS.

(No. 2,699.)

(Submitted May 4, 1909. Decided May 22, 1909.)

[101 Pac. 969.]

Judgment — Restraining Enforcement — Tender — Pleadings — Election of Remedies — Estoppel — Counterclaims.

Judgment—Restraining Enforcement—Pleadings—Tender.

1. In an action to enjoin the enforcement of a judgment against him amounting to over \$7,000, plaintiff alleged, *inter alia*, that defendants were indebted to him in a sum in excess of \$5,000 and insolvent, and that he was willing and ready to pay the balance of the judgment in favor of defendants. The court issued an order granting an injunction *pendente lite*. *Held*, that for failing to make a tender of the amount admittedly due to defendants, the complaint did not state facts sufficient to entitle plaintiff to the relief granted.

Same—Inequitable Relief.

2. The order of the court in restraining defendants from receiving from plaintiff the balance admittedly due them unless they consented to his obtaining a judgment against them for the amount of his claim, was tantamount to requiring them to waive any defense they might have, and therefore inequitable.

Same—Insolvency—Evidence—Admissibility.

3. The court erred in refusing to permit defendants to introduce proof that plaintiff when making the offer referred to in paragraph 1 above, that he was ready and willing to pay the balance due them, was insolvent.

Same—Defenses—Attorneys' Liens—Who may Assert.

4. An attorney's lien upon a judgment, the enforcement of which is sought to be enjoined, can only be asserted by the attorney himself and not by the party against whom the injunction is asked.

Election of Remedies—Mistake—Effect.

5. While a party to whom the law furnishes two or more methods of redress in a given case, based upon inconsistent theories, is put to his

election, and bound by it if made with full knowledge of the facts, he will not be held to have made an election of remedies if he prosecuted an action based upon a remedial right which he erroneously supposed he had, but did in fact not have, and is defeated because of his error, but may in a new action assert one which he has, even though inconsistent with the one first set up.

Judgment—*Res Adjudicata*—Estoppel.

6. Where plaintiff in a claim and delivery action, in which he was defeated, had not made any assertion that defendants were indebted to him, although they admitted that they owed him a certain amount, the matter of their indebtedness to him could not have been litigated, and he was therefore not estopped from thereafter in a separate action to assert such indebtedness.

Counterclaims—What Constitutes.

7. To constitute a counterclaim, a failure to plead which will thereafter bar an action thereon, it must appear affirmatively from the pleadings that the cause of action asserted is one "arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." (Revised Codes, sec. 6541.)

Same—"Connected with Subject of Action."

8. That new matter constituting a counterclaim may be said to be "connected with the subject of the action," it must present some legal relationship with the subject of plaintiff's action as disclosed in his complaint.

Same.

9. Defendants had brought an action against plaintiff to recover the amount of a note alleged to have been received by him to their use. In his answer plaintiff admitted the receipt of the money but denied the other material allegations of the complaint. Subsequently plaintiff brought suit against defendants on an indebtedness alleged to be due him from them on a sale of goods. The consideration for the note did not appear in the record on appeal in the suit by plaintiff against defendants. *Held*, that plaintiff's cause of action for the unpaid balance of the purchase price of the goods sold to defendants, did not present any legal connection with the money which plaintiff had collected on the note, and that therefore his failure to plead it as a counterclaim in answer to the complaint of defendants, did not constitute a bar to his suit.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Suit by Louis Kaufman against C. W. Cooper and another to restrain enforcement of a judgment. From an order granting an injunction *pendente lite*, defendants appeal. Reversed and remanded.

Messrs. Breen & Hogevoll, and Messrs. Maury & Templeman, for Appellants.

The power of courts of equity to enjoin the enforcement of judgments, being liable to abuse and the abuse of it being extremely mischievous, its exercise will be closely and carefully scrutinized and confined to clear cases and well-recognized grounds of equitable interference. (*Kersey v. Rash*, 3 Del. Ch. 321; *Johnson v. Templeton*, 60 Tex. 238.) Before a party is entitled to equitable relief against the enforcement of a judgment, he must have exhausted his resources at law. (23 Cyc. 981, and cases cited.) Furthermore, when the bill states simply a ground for legal relief and contains no equity, the judgment will not be enjoined though the judgment creditor be a non-resident of the state and personal service cannot be had on him. (*Walker v. Thomas*, 88 Ky. 486, 11 S. W. 434; *Smith v. Washington etc. Co.*, 31 Md. 12, 100 Am. Dec. 49; *Beall v. Brown*, 7 Md. 393.) In allowing the injunction against the enforcement of the judgment, the court erred. (*Levy v. Steinbach*, 43 Md. 212.)

If plaintiff commences an action, seeking one kind of a remedy with full knowledge of the facts, he is presumed conclusively to have elected his remedy and cannot retract by withdrawing his suit. (2 Herman on Estoppel, 1172.) The doctrine is applicable, not only to the election made in the course of litigation, but in the course of dealings between parties *in pais*. (See *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91, note; *Kinney v. Kiernan*, 49 N. Y. 164; *Syme v. Badger*, 92 N. C. 706; *Mendenhall v. Mendenhall*, 8 Jones, 287; *Jones v. Geroch*, 6 Jones Eq. 190; *Yorkly v. Stinson*, 97 N. C. 236, 240, 1 S. E. 452; 1 Bigelow on Fraud, 436.) All actions which proceed upon the theory that the title to the property in controversy remains in plaintiff, are naturally inconsistent with those which proceed upon the theory that title has passed to defendant. (*Brown v. Littlefield*, 1 Wend. 404, 7 Wend. 454, 11 Wend. 467; *McElroy v. Mancius*, 13 Johns. 121; *Sanger v. Wood*, 3 Johns. Ch. 416; *Junkins v. Simpson*, 14 Me. 364; *Butler v. Miller*, 1 N. Y. 496; see, also, *Thomas v.*

Sugarman, 157 Fed. 669, 85 C. C. A. 337, 15 L. R. A., n. s., 1267.)

Mr. John J. McHatton, for Respondent.

The right of the respondent to have his claim determined in judgment and have the same set off against the judgment of the defendants is well sustained. (*Wells-Fargo Co. v. Clarkson*, 5 Mont. 336, 5 Pac. 894; *Jump v. Leon*, 192 Mass. 511, 116 Am. St. Rep. 265, 78 N. E. 532; *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Coonan v. Lowenthal*, 147 Cal. 218, 109 Am. St. Rep. 128, 81 Pac. 527; *McManus v. Cash & Luckel* (Tex.), 108 S. W. 800; *Wells v. Clarkson*, 2 Mont. 230.) And that the appellant was entitled to the injunction is also sustained. (*Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419.)

The cause of action set forth by plaintiffs in the action on the note was in the nature of an action for conversion, and therefore the plaintiff was not required to set forth a counterclaim. (*Gunnerson v. Erickson*, 69 Ill. App. 159; *Goldberger v. Leibowitz*, 42 Colo. 99, 93 Pac. 1108.) Nor was the claim in anywise connected with the subject of that action. A counterclaim in contract cannot be pleaded against a cause of action in tort. (*Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664; *Collier v. Ervin*, 3 Mont. 142; *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943; *Stadler v. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145.) A counterclaim may or may not be pleaded, as the defendant shall elect; and, unless it is pleaded, the right to sue upon it as an independent cause of action, or to rely upon it as a defense to another action brought by the same plaintiff, is in no wise affected or injured by a judgment for or against the defendant. (*Jones v. Witousek*, 114 Iowa, 14, 86 N. W. 59.) A party does not lose his action for a demand which he might have pleaded as a setoff, but neglected to do so. (*Hobbs v. Duff*, 23 Cal. 596-630.)

The insolvency of one of the parties is sufficient ground for the court to exercise its equitable jurisdiction in allowing an

equitable setoff. (*Quick v. Lemon*, 105 Ill. 587; *Gay v. Gay*, 10 Paige, 369; *McDonald v. Mackenzie*, 24 Or. 573, 14 Pac. 866; *Jarret v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596; *Howard v. Shores*, 20 Cal. 277; *O'Neill v. Perryman*, 102 Ala. 522, 14 South. 898.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1904 this plaintiff, Louis Kaufman, commenced an action in claim and delivery against Cooper and Archibald, defendants, to recover the possession of certain goods, wares and merchandise and a certain promissory note, all of the alleged value of \$2,500. The defendants answered denying title or right of possession in plaintiff, and claiming title and right of possession in themselves, but admitting that they owed the plaintiff \$2,500 as a part of the purchase price of the property. A supplemental answer was filed, setting forth that the plaintiff had taken the goods, excepting the note, under an order to the sheriff, and had disposed of them, so that a return could not be had. This allegation in the supplemental answer was not denied. Upon the trial the jury found that the defendants were the owners and entitled to the possession of the goods, and that plaintiff had disposed of them so that return could not be had. The verdict then proceeds: "We find that on the date the said property was taken, to-wit, June 13, 1904, the interest of James Archibald and C. W. Cooper, defendants, in the said property taken by Louis Kaufman, was of the value of \$5,000." A judgment was entered upon the verdict, and from that judgment and an order denying him a new trial Kaufman appealed to this court, where the appeal from the judgment was dismissed and the order was affirmed. (*Kaufman v. Cooper et al.*, 38 Mont. 6, 98 Pac. 504.) The judgment, with interest and costs, amounted to \$7,031.70, not including the costs of appeal. When the *remittitur* from this court was filed with the clerk of the district court, Kaufman commenced this suit to enjoin the en-

forcement of the judgment. The complaint alleges, briefly, the proceedings had in the first case, then alleges that defendants are indebted to plaintiff in the sum of \$3,882.78 and interest, amounting in the aggregate to \$5,807.65, that the defendants are insolvent, and then contains this allegation: "That the plaintiff is willing and ready and hereby offers to pay the balance of said judgment in favor of the defendants and against him, amounting to the sum of \$1,224.15, and the costs of appeal in said action." The prayer is for an injunction to stay the enforcement of the judgment obtained by defendants in the first action, until the final determination of this suit, and that any judgment obtained by the plaintiff in this suit may be offset against the judgment obtained by the defendants in the first action. The defendants answered, and, after admitting the proceedings had in the first action and denying most of the material allegations of the complaint, alleged that their admission in the first action of an indebtedness of \$2,500 was erroneous and ought to have been an admission of only \$2,100. Other matters are alleged which need not be noticed at length at this time. A hearing was had upon the application for an injunction, and at its conclusion an injunction *pendente lite* was issued which restrains the defendants from attempting to enforce their judgment pending the determination of this suit. One paragraph of the injunction order reads as follows: "It is further ordered that this injunction shall not prevent the defendants from receiving the difference in amount between their said judgment, and the amount and costs sued upon in this action, provided that said defendants shall consent to the plaintiff obtaining a judgment against them for the amount sued for herein, and having the same credited or offset upon the judgment which the defendants hold against the plaintiff." From the order granting the injunction, the defendants have appealed.

Upon the hearing of the application for an injunction, Kaufman, the plaintiff, was called as a witness, and it was sought by the defendants to show that he is insolvent. Upon objection by his counsel, this inquiry was not permitted to be made.

Kaufman is now in a court of equity seeking equitable relief, and the most elementary principle of equity requires that he should not merely offer to do equity, but that he should do equity. In his complaint he concedes that he owes Cooper and Archibald \$1,224.15 over and above any claim which he has against them; but, instead of tendering that amount into court for them, he merely alleges that he is ready and willing to pay it; and when it was sought to show that his offer was not made in good faith—that is, that he was in fact unable financially to make his offer good—the defendants were not permitted to make the showing. The injunction order itself is unconscionable, in that it restrains the defendants from collecting the \$1,224.15 admitted to be due them, unless they will waive any defense that they may have to the plaintiff's claim for \$5,807.65, or any portion of it. For failing to make a tender of the amount admittedly due the defendants, the complaint fails to state facts entitling the plaintiff to an injunction; and the evidence likewise fails to show a case for equitable interference to any extent, much less to such an extraordinary extent as was granted. The evidence as to Cooper and Archibald's insolvency is altogether too meager to make out even a *prima facie* case.

It is also suggested that the enforcement of the judgment ought not to have been restrained, because it appears from the answer in the suit that certain attorneys have a lien upon the judgment. We need not consider this further than to suggest that any claim of a lien would have to be asserted by the attorneys themselves and cannot be urged for them by the defendants in this suit.

But in addition to reversing the order granting an injunction, we are asked to determine this suit upon the merits and to conclude the litigation. To that end counsel for the appellants submitted certain propositions:

1. It is said that, in bringing his action in claim and delivery, Kaufman elected his remedy and will not thereafter be permitted to pursue another and inconsistent remedy. It is a general rule that, whenever the law furnishes to a party two or

more methods of redress in a given case, based upon inconsistent theories, the party is put to his election, and when, with full knowledge of the facts, he makes his selection of the remedy he desires to pursue, such action is irrevocable and is a bar to his right to resort to any other remedy based upon a remedial right inconsistent with the right first asserted; but there is another rule of law equally well established, which is that if a person prosecutes an action based upon a remedial right which he erroneously supposed he had, but which in fact he did not have, and he is defeated because of his error, he will not be held to have made an election of remedies, and will not be precluded from asserting one which he has, even though it be inconsistent with that which he supposed he had but did not have. These rules are recognized by the authorities generally. (15 Cyc. 252, 262; 7 Ency. of Pl. & Pr. 361, 366.) A review of the history of the first case convinces us that in that instance Kaufman merely made a mistake as to the remedy available to him, and it ought not to be said that by making such mistake the admitted indebtedness of Cooper and Archibald to him was thereby satisfied. The law does not recognize that method of discharging one's liabilities.

2. But it is contended that Kaufman ought not to be heard in this suit to assert that Cooper and Archibald are indebted to him, for the reason that any indebtedness of theirs to him was considered by the jury in the first case and was deducted from the actual value of the goods in arriving at the value of the Cooper and Archibald interest in the goods; and some color is lent to this view by an instruction of the court and the form of the verdict returned. The court instructed the jury that, if they found the issues in favor of Cooper and Archibald, they should ascertain and include in their verdict the value of their interest in such goods. In the verdict the jury returned that they found for the defendants, and found that the value of their interest in the property at the time it was taken by Kaufman was \$5,000. While these matters lend some support to appellants' contention, they do not convince

us of the correctness of it. In the first place, Kaufman was not asserting in that case that Cooper and Archibald were indebted to him; on the contrary, he was contending that the goods belonged to him, and there was therefore no opportunity to litigate the question of indebtedness or the amount of it, if in fact it existed. But, furthermore, the jury having found that the transaction between Kaufman, on the one hand, and Cooper and Archibald, on the other, amounted to a sale of the property by the former to the latter, and that the title thereby actually passed could not bind Kaufman as to the amount due him upon the purchase price, by the bare admission made by Cooper and Archibald in their answer. If, in fact, the unpaid balance is \$3,882.78, as Kaufman claims, then he ought not to be compelled to accept \$2,500 merely because that amount was admitted to be due him.

3. In the action in claim and delivery brought by Kaufman, the complaint mentions a certain promissory note for \$455, executed and delivered by Feldman & Co. There is not any specific reference to it in the answer of Cooper and Archibald, but in their supplemental answer they say that the sheriff has delivered all the goods to Kaufman, except the Feldman note, and in the verdict of the jury this note seems to have been excluded from consideration. After the first action had gone to judgment, Cooper and Archibald brought an action against Kaufman to recover \$455, received by Kaufman from Feldman to the use of Cooper and Archibald. In this complaint they allege that Kaufman had collected from Feldman the amount of the note (\$455), which amount in equity and good conscience he ought to pay over to them. In his answer in that action Kaufman admitted that he had received the \$455 from Feldman, but denied the other material allegation of the complaint. It is now insisted that, by failing to set forth, as a counterclaim in that action, the amount he claims in the present suit, Kaufman waived his right to insist that Cooper and Archibald are indebted to him now.

Section 6540, Revised Codes, provides, among other things, that an answer may contain a statement of any new matter constituting a counterclaim. Section 6541 defines the "counterclaim" mentioned above, and in the first subdivision thereof provides that it is "a cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." Section 6547 provides: "If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of section 6541, neither he nor his assignee can afterward maintain an action against the plaintiff therefor." It is upon these provisions that appellants now rely to support their contention. It is to be observed that it is only such a counterclaim as is mentioned in subdivision 1 of section 6541, above, that a party must assert in a pending action, or be forever barred from thereafter maintaining an action therefor. In our opinion the meaning of these provisions is that it must appear affirmatively from the pleadings that the cause of action asserted is one which falls within the class mentioned in that subdivision. Can it be said, then, that it appears affirmatively that Kaufman's claim for the unpaid balance of the purchase price of the goods which he sold to Cooper and Archibald arose out of the transaction set forth in Cooper and Archibald's complaint against him for the \$455 collected from Feldman, or that it was connected with the subject of their action? The only transaction mentioned by Cooper and Archibald in their complaint in the action against Kaufman to secure the \$455 was Kaufman's collection of the Feldman note, and his retention of the money; and Kaufman's present claim for the unpaid balance of the purchase price of the goods sold by him to Cooper and Archibald cannot in any sense be said to arise out of that transaction.

Can it be said that Kaufman's cause of action is connected with the subject of the Cooper and Archibald action against him to recover the \$455? From the record before us we cannot say what was the consideration for the Feldman note, or just what relation that note bears to the other transactions mentioned.

The phrase "connected with the subject of the action" is found in the Codes of many of the states in the same connection in which it is employed in our own, and some diversity of opinion has arisen as to the scope of its meaning; but, in every instance where a question of this character has arisen, the court has been compelled to accept the guidance of certain general rules and apply them, as best they can be applied, to the facts of the particular case: (a) There must be some legal relationship between the ground of recovery mentioned in the counterclaim, and the subject of plaintiff's action as disclosed in his complaint. (*Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025; 25 Am. & Eng. Ency. of Law, 596.) (b) But if the causes of action exist independently of each other, the one need not be asserted as a counterclaim in the action upon the other. (25 Am. & Eng. Ency. of Law, 597.) In *Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664, this court had before it an action by plaintiff to recover damages for the wrongful collection of certain moneys by the defendant. The action was in tort. The defendant sought to interpose a counterclaim. The statute then in force used the phrase "connected with the subject of the action" in the same sense as it is employed in subdivision 1 above. This court held that the subject of plaintiff's action was the money seized by the defendant, and this we think is correct. (Bliss on Code Pleading, 3d ed., sec. 126.) The subject of the Cooper and Archibald action to recover from Kaufman was the money (\$455) which Kaufman had collected from Feldman. It cannot be said that Kaufman's cause of action for the unpaid balance of the purchase price of the goods sold by him to Cooper and Archibald presents any legal connection with the money which he collected from Feldman upon the note the consideration for which is not made to appear by this record. There is not any such connection as is contemplated by subdivision 1 above, but, on the contrary, Cooper and Archibald's cause of action for the \$455, and Kaufman's cause of action for the \$3,882, appear to exist independently of each other. It may be that Kaufman could have interposed his claim as a counterclaim,

under subdivision 2 of section 6541 above; but even if so, a failure to interpose it under that subdivision does not preclude him from afterward asserting his claim in an independent action.

For the reasons hereinbefore given, the order of the district court granting an injunction *pendente lite* is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied June 21, 1909.

BUTTE NORTHERN COPPER CO. ET AL., RESPONDENTS, v.
RADMILOVICH, APPELLANT.

(No. 2,620.)

(Submitted May 5, 1909. Decided May 22, 1909.)

[101 Pac. 1078.]

Quartz Lode Claims—Location—Declaratory Statement—Substantial Compliance with Statute Sufficient—Location Notice—Posting—Costs—Erroneous Allowance—Judgment—Amendment After Appeal.

Appeal—Evidence—Objections—When not Reviewable.

1. An objection to the introduction of evidence not urged in the district court will not be considered on appeal.

Quartz Lode Claims—Declaratory Statement—Sufficiency.

2. A declaratory statement of the location of a quartz lode mining claim which, though not technically complying with the requirements of the statute, did so substantially, was sufficient.

Same—Notice of Location—Where Posted.

3. While the locator of a quartz lode mining claim is not required to sink his discovery shaft at a point of discovery, he must post his notice of location at that point.

Same—Notice of Location—Posting.

4. The locator of a quartz lode claim had posted his notice of location a considerable distance away from the point of discovery, but about a month thereafter sank his discovery shaft at the point where he posted his notice of location. In the meantime, however, another had made discovery and posted his notice. *Held*, that because of the intervening

rights of the latter, the former's location must be held to be postponed to the date when he posted his notice at the point of discovery.

Same—Location Notice—Description of Course of Vein.

5. The finding of the district court in an adverse suit to a mining claim that a notice of location describing the course of the vein as north and south was insufficient to support a location along a vein the general course of which was east and west, was erroneous.

Costs—Insertion in Judgment—Ministerial Duty.

6. The clerk of the district court in carrying out the provisions of section 7173, Revised Codes, relative to the insertion of costs in the judgment where the same have been taxed or ascertained, acts in a ministerial capacity.

Same—Allowance—When Error.

7. It was error to allow costs where no showing had been made to the court that the successful party had claimed them, as provided in section 7170, Revised Codes.

Same—Adding to Judgment After Appeal—Error.

8. After an appeal has been perfected, the district court is without jurisdiction to amend the judgment by adding a provision that the successful party recover his costs.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

CONSOLIDATED ACTIONS by the Butte Northern Copper Company against John Radmilovich, and John Stepan against the same defendant. Defendant appeals in each case from a judgment for plaintiff, from an order denying a new trial, and from an order amending the judgment. Order denying a new trial affirmed in each case.

Order in each case amending the judgment reversed, and causes remanded with instructions to strike out the amendment, and, as so amended, judgment affirmed.

Mr. Jesse B. Roote, Mr. A. C. McDaniel, and Mr. Jas. E. Murray, for Appellant.

Mr. C. M. Parr, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In July, 1906, John Radmilovich made application in the United States land office at Helena, Montana, for a patent to the

Balkan quartz lode mining claim. The Butte Northern Copper Company and John Stepan filed adverse claims, claiming a portion of the ground under their location of the Stepan No. 2 claim, and another portion under their location of the Minnesota claim. Their adverse claims were allowed in the land office, and within thirty days afterwards they commenced two actions against Radmilovich, one based upon each of their claims. The defendant answered, putting in issue most of the allegations in each complaint, and in each instance set forth his claim to the ground in dispute by virtue of his prior location of the ground as the Balkan claim. The two cases were consolidated for the purpose of trial. Upon the hearing the defendant objected to the introduction of any evidence by the plaintiffs, upon the ground that neither of their complaints states facts sufficient to constitute a cause of action. This objection was overruled. The plaintiffs then offered in evidence a certified copy of the articles of incorporation of the Butte Northern Copper Company, to which offer the defendant interposed the following objection: "We just offer the objection that it is incompetent, irrelevant, and immaterial under the objection heretofore made." The objection was overruled. Objection was also made to the introduction in evidence of the declaratory statement and amended declaratory statement of the Minnesota claim. This objection was also overruled. At the close of plaintiff's case in each instance, the defendant moved the court to dismiss the action on the ground of the insufficiency of the evidence to justify any finding in plaintiff's favor. These motions were denied. At the conclusion of the evidence the court found that defendant had posted his notice of location of the Balkan lode claim three days prior to the time plaintiffs posted their notices of location. The finding proceeds: "In this case both parties proceeded to do and did all things necessary to make their locations valid, save that defendant's notice of location which was posted three days prior to plaintiffs' was not posted 'at the point of discovery' as required by statute, but was posted sixty feet west of a vein exposure in the Sea Lion cut. Further, his

notice was of a north and south vein, while the above vein exposure was of an east and west vein." The conclusion of the court was that plaintiffs are entitled to the ground in controversy and to a patent therefor. A judgment was accordingly rendered and entered in each case in favor of the plaintiffs and against the defendant. The judgments were entered on March 26, 1908. On July 31, 1908, defendant perfected his appeal from the judgment in each instance. On August 3 plaintiffs moved the court to amend the judgment in each action by inserting therein a provision adjudging to the plaintiffs their costs and fixing the amount recoverable. On August 15 the court sustained this motion in each case, and ordered the judgments amended accordingly *nunc pro tunc* as of the date of rendition of the judgments. The defendant appealed in each case from the judgment, from the order denying him a new trial, and from the order amending the judgment.

The only objection made to the introduction in evidence of the certified copy of the articles of incorporation of the Butte Northern Copper Company was that the complaint in each case does not state facts sufficient to constitute a cause of action. This objection does not raise the question considered by this court in *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995; and upon appeal this court will only consider the ground of the objection urged in the court below. (8 Ency. of Pl. & Pr. 163.)

It is contended that neither complaint states a cause of action because the declaratory statements are insufficient. It is said that they do not show that the development work was done within sixty days from the date of posting the location notices. The statutory provisions in force at the time are found in section 3610, and sections 3611 and 3612, Political Code, 1895, as amended by an Act of the Seventh Legislative Assembly approved March 15, 1901 (Laws 1901, p. 140). In the original declaratory statement of the Minnesota claim the development work is described as follows: "At the point of discovery a cut, the dimensions of which are 5 by 11 feet, and 5 feet in depth,

along the course of the vein has been run." And in the amended declaratory statement it is said that the locator, within thirty days after posting his notice of location, "did distinctly mark said location upon the ground so that its boundaries could be readily traced, and did dig a cut at the point of discovery of the following dimensions, to-wit: 5 ft. wide, 15 ft. long and 10 feet deep at the face of the cut." And again: "At the point of discovery said locator and claimant has dug a cut the dimensions of which are 5 by 15 feet and 10 feet in depth, in which is disclosed a well-defined vein, crevice or deposit of ore at a vertical depth of at least ten feet below the lowest point of the rim or collar of said discovery cut at the face of said cut at the surface." In the original declaratory statement of the Stepan No. 2 claim, the development work is described as follows: "At the point of discovery a cut the dimensions of which are 4 by 11 feet, and 5 feet in depth and length 11." And in the amended declaratory statement it is said that the locator, within thirty days after posting his notice of location, "did distinctly mark said location upon the ground so that its boundaries could be readily traced, and did dig a cut at the point of discovery of the following dimensions, to-wit: 4 feet wide, 5 feet deep and 11 feet in length along said lead." And again: "At the point of discovery said locator and claimant has dug a cut the dimensions of which are 4 by 15 feet and 10 feet in depth, in which is disclosed a well-defined vein, crevice or deposit of ore at a vertical depth of at least ten feet below the lowest point of the rim or collar of said discovery cut at the face of said cut at the surface." In each instance both the original and amended declaratory statements were filed within sixty days after the notice of location was posted, so that it does appear affirmatively that the development work was actually done within the time allowed by law. While these declaratory statements may not comply technically with the requirements of the statute, there is in them at least a substantial compliance, and this is all that has ever been required. The

authorities in support of this may be found cited in *Dolan v. Passmore*, 34 Mont. 277, 85 Pac. 1034.

While the evidence is somewhat meager upon the questions of the mineral values in either claim, as to whether the claims were relocations or original locations, and as to whether the ground was in fact open to location at the time plaintiffs made their locations, the trial court found in their favor upon each of these questions, and we are not prepared to say that such findings are not justified by the record.

The trial court found that defendant was prior in time in posting his notice of location, but held the plaintiffs' locations prior and superior, because (a) defendant's location notice was not posted at the point of discovery, and (b) his notice described a north and south vein, while the vein exposure was of an east and west vein. The evidence is sufficient to sustain the finding of the court that the defendant did not post his location notice at the place of discovery, as required by section 3610 above. The evidence tends very strongly to show that he made discovery on March 15 or earlier; that he discovered mineral-bearing rock in place near the extreme westerly boundary of his claim and several hundred feet from the place where he posted his notice of location; that he also found mineral-bearing rock in place exposed in an excavation on the Sea Lion claim, some fifty or sixty feet from the place where he posted his location notice. We agree with counsel for appellant that the locator is not required to sink his discovery shaft at the point of discovery (*O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302); but that question is not the one involved here. The question here presented is, Must he post his notice of location at the point of discovery? The statute provides that he shall do so. The successive steps provided for are (1) discovery, (2) posting notice of location, (3) marking boundaries, (4) sinking discovery shaft, etc. In his article on Mines and Minerals, 27 Cyc., at page 564, in speaking of the place where the notice of location must be posted, Judge Clayberg says: "The place of posting the notice is generally designated by statute or local rule,

the requirements of which must be complied with." As observed above, our statute requires that the notice shall be posted "at the point of discovery." The posting of this notice is done long before the discovery shaft is required to be sunk, and the only direction as to where the discovery shaft shall be sunk is that it shall be within the claim and upon the lode or vein. It cannot be said that the defendant complied literally or substantially with the statute in posting his notice of location at the point where it was posted. But our attention is directed to the fact that upon April 15 he sunk his discovery shaft at the point where he posted his notice of location, and that the vein was disclosed in this shaft. The record bears out this statement, and, but for the intervention of plaintiffs' rights, such discovery would have supported his location (27 Cyc. 558); but because of the intervention of the rights of plaintiffs, defendant's location must be held to be postponed until April 15, the date when he posted his notice of location at the point of discovery. We do not agree with the conclusion of the trial court that a notice of location describing the course of the vein as north and south will not support a location of a claim along a vein the general course of which is east and west (*Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037); but this is of little consequence in this case, in view of what is said above.

The judgment in each case, as originally rendered, did not make any provision for costs. After the appeal had been perfected in each case, the trial court, upon motion of the plaintiffs, amended the judgment by adding a provision that plaintiffs recover their costs and fixing the amount of the costs recoverable. Section 7173, Revised Codes, provides: "The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket

of the judgment." In carrying out the provisions of this section, the clerk merely acts in a ministerial capacity. (*Orr v. Haskell*, 2 Mont. 350.) Section 7170 provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court * * * a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified," etc. There was not any showing made to the district court that the plaintiffs had claimed their costs, as in this section provided, and since costs were not allowed at common law, but must be recovered, if at all, by virtue of the statute, then, in order to obtain costs, the party entitled thereto must comply with the statute. (*Orr v. Haskell*, above.) In the absence of a showing that these plaintiffs had complied with the statute, the court was not justified in awarding them costs. The judgments in the first instance did not award costs. There was not any adjudication upon the question; but the judgments were nevertheless valid and regular, and, after the appeals had been perfected, the district court was without jurisdiction to change the judgments in any material respect.

The order denying defendant a new trial in each case is affirmed. The order in each case amending the judgment is reversed. The causes are remanded to the district court, with directions to strike out the amendment in each judgment awarding costs, and, as so amended, the judgments will be affirmed. Each party will pay his own costs of these appeals.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE EX REL. SCHNEIDER, RELATOR, v. CUNNINGHAM,
STATE AUDITOR, RESPONDENT.

(No. 2,713.)

(Submitted May 10, 1909. Decided May 25, 1909.)

[101 Pac. 962.]

*Supreme Court—Power to Appoint Assistants—Stenographer—
State Board of Examiners—Powers—Constitution—Statutes
—Appropriations—Mandamus.*

Supreme Court—Assistants—Power to Appoint—Compensation—Liquidated Claim.

1. Where the state has failed to make provision for necessary assistants to the supreme court, the court may, both under its inherent power and under the authority conferred by section 6248, Revised Codes, select and appoint them, and make the compensation due them for their services a charge against the state as a liquidated claim.

Same—State Board of Examiners—Powers.

2. Section 262, Revised Codes, authorizing the board of examiners to employ clerical help for any state officer or board, and prohibiting such officers or boards from employing clerks without the authority of the board of examiners, does not apply to the employees of the supreme court; it, viewed as a department of the state government, not being an officer or board within the terms of the provision.

Same—State Board of Examiners—Powers—Constitution—Statutes.

3. Section 20, Article VII, of the Constitution, and section 226, Revised Codes, empowering the state board of examiners to examine all claims against the state, except salaries of officers fixed by law, apply to unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of the state government having authority to fix them.

Same—Stenographer—Compensation—Liquidated Claim.

4. *Held*, on *mandamus* to the state auditor, that, under the rule declared in paragraph 3 above, where by general appropriation bill provision for the compensation of the stenographer of the supreme court had been made, his claim for salary earned was not an unliquidated claim which required approval of the board of examiners before issuance of warrant.

Same—Stenographer—Compensation—General Appropriation Bill.

5. The declaration in a general appropriation that the sums named therein, "or so much thereof as may be necessary," are appropriated for the purposes named, has no reference to the salary of the stenographer of the supreme court as fixed therein, so as to empower the state board of examiners to fix a smaller amount. Any discretion in this regard is addressed to the supreme court, vested with the power to appoint such officer and control the disbursement of the sum thus appropriated.

ORIGINAL application by A. C. Schneider for writ of *mandamus* to H. R. Cunningham, State Auditor. Writ granted.

Mr. C. A. Spaulding, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for *mandamus*. The legislature has never passed an Act formally creating the office of stenographer of this court, but from session to session has made appropriations in the general appropriation bill for the executive and judicial departments of the government of specific sums to be used for the employment of a competent person to perform the services necessary in this behalf. This amount has been increased from time to time as the changing circumstances seemed to require. The relator has served the court at its pleasure by appointment since February 10, 1896. At that time the provision for his compensation was \$125 per month. At the session of the legislature of 1901 the appropriation made was \$150 per month, and at the last session the appropriation was increased to \$200 per month. Payment of these sums has heretofore been made from month to month without question, the state board of examiners assuming that the appropriation thus made fixed the amounts to which the person performing the services has been entitled, and that the claims therefor were not claims against the state in the ordinary sense of that term. On March 24, 1909, the board assumed to authorize this court to employ a stenographer, and fixed the compensation to be paid him at \$150 per month. The general appropriation bill having been approved on March 11, 1909, the relator on April 8 made demand upon the auditor that he issue his warrant upon the treasurer for the full amount of \$200 as compensation for services performed during the month of March. This demand was refused because of the action of the

board of examiners above referred to. Thereupon this proceeding was instituted to compel the auditor to issue the warrant as demanded.

There is no controversy as to the facts. The question at issue is whether, after the legislature has made what may, for present purposes, be deemed sufficient provision for proper and necessary aid to the court, the board of examiners has the authority to say that the relator, the appointee of the court, is not entitled to the compensation thus provided. It has assumed to act under section 20, Article VII, of the Constitution, and section 262, Revised Codes. These provisions are as follows: "Sec. 20. The Governor, Secretary of State and Attorney General shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prisons as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claims against the state except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board. The legislative assembly may provide for the temporary suspension of the State Treasurer by the Governor, when the board of examiners deem such action necessary for the protection of the moneys of the state." (Constitution, Art. VII.) "Sec. 262 [Revised Codes]. The board of examiners may at any time when necessary, employ clerical help for any state officer or board, and no clerks must be employed by such officers or board without the authority of the board of examiners, and no such clerks must be employed by the board of examiners except when all the duties of the office cannot be performed by the officer himself." The result of this action, if it be held to be of binding force, is that this court in some of its important functions is subject to the control of the state board of examiners; for to say that it may grant the court permission to employ a stenographer is to say that in its discretion

it may withhold permission. This means no more nor less than that, though the services of a stenographer are absolutely necessary to the proper accomplishment of the work of the court—a fact about which there can be no dispute—the board may in its discretion cut off all such services, and thus virtually disable the court, or at least seriously impede and hamper it, in the discharge of its duties. To say that it may fix the compensation to be paid for such services is also an assertion of the same power; for, if through mistake or lack of knowledge, or from any other cause, if any such exist, the board should fix the compensation at such a figure as to render it impossible to secure suitable service, this would be attended by the same consequences as if no compensation were allowed.

The Constitution of this state divides the powers of government into three distinct departments—the legislative, executive and judicial. (Article IV, section 1.) It then provides that “no person or collection of persons charged with the exercise of powers belonging to one of these departments shall exercise any powers properly belonging to either of the others”; the only exception being where some provision is found in the Constitution expressly providing otherwise. It is not our purpose to discuss this provision, nor to attempt to define with exactness the limitations imposed by it. It is within the knowledge of every intelligent man that its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally a violation of the people’s confidence. Indeed, the distinction goes so far as to require each department to refrain from in any way impeding

the exercise of the proper functions belonging to either of the other departments. This statement applies with special force to the judicial department, since it is the body upon which is cast the duty of deciding finally in particular cases whether there has been excess on the part of the executive or legislative departments calling for restraint or defect requiring compulsory action in order to supply it. Hence it has consistently recognized the fact that the powers of the legislature are, within the limitations of the Constitution, plenary, by recognizing and enforcing its enactments in all cases, except when refusal has been clearly necessary, and there is no reasonable doubt but that the body has infringed some provision of the state or federal Constitution. (*State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635; *State ex rel. Anaconda C. Min. Co. v. Clancy*, 30 Mont. 529, 77 Pac. 312; *State ex rel. B. & M. Min. Co. v. District Court*, 30 Mont. 193, 76 Pac. 10; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833; *Jordan v. Andrus*, 26 Mont. 37, 91 Am. St. Rep. 396, 66 Pac. 502.) It has also uniformly refused to attempt to control the action of the executive officers, either of the state or of any municipality, except to coerce them into activity when there has been shortcoming, or to restrain action where there has been excess. (*State ex rel. Woody v. Rotwitt*, 18 Mont. 502, 46 Pac. 370; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 44, 57 Pac. 449; *State ex rel. Gilchrist v. Weston*, 27 Mont. 185, 70 Pac. 519, 1134; *State ex rel. Haire v. Rice*, 33 Mont. 365, 83 Pac. 874.) It will be observed upon a casual examination of the foregoing cases that whenever the particular executive duty required the exercise of political or administrative discretion, this court has deemed itself without power to interfere, and that, too, without regard to the question whether the discretion was wisely exercised or not.

In many respects the duties of the stenographer employed by this court are peculiar, and cannot be performed by one who does not possess special qualifications. In the first place, he must possess the requisite mechanical skill, not only to take

stenographic notes during the preparation of written opinions by the different members of the court, but after they have been prepared, he must reduce them to suitable form in type to become a part of the permanent records of the court. In doing this it is often the case, because of his fitness and knowledge, that he must verify citations by inserting the proper page, title and volume. It is also often the case that he must take stenographic notes of oral testimony of witnesses upon hearings had in this court. He must be, then, not only a skillful mechanic, but an intelligent helper. During the progress of his work he occupies toward the members of the court not only close personal relations, but enjoys, in connection with his work, their utmost confidence, because of necessity he must know beforehand the result in every decision often many days or weeks before it is made public. It is therefore within his power, either from corrupt motives or by inadvertence or lack of discretion, to betray this confidence, and thus become the source of great public disorder and mischief. This intimate relation cannot be avoided. Hence the particular person who is the depository of the court's confidence must not only be honest and trustworthy, but also careful, industrious and discreet. His personal habits, associates and mode of life must also be taken into account; for, though one may be ever so skillful and honest, daily contact with him might be objectionable, because his standard in these respects might be too low. The people are entitled to the best service the court can afford, not only in the work done by its members individually and collectively, but also by the employees under its control. They are entitled to have its business conducted with dispatch; hence attentive and effective industry in its employees is indispensable. For the accomplishment of this end the court is entirely and solely responsible, and, if there be shortcoming or failure, either in the intellectual or mechanical quality of its work, it alone is to blame.

In view of these considerations, it is manifest that the power to select the proper employees could not with propriety, be vested elsewhere than in the court itself; and it is equally mani-

fest that the power to say whether it may or may not be necessary to have assistance, and what the qualifications of the assistants shall be, may not be vested elsewhere. If the power of appointment exists at all, it is a necessary power of the court, and, since the qualifications of the individual desired is determined in a measure by the amount of compensation paid for his services, the power to fix the compensation is also a necessary power. In short, the court has the inherent power to select and appoint its own necessary assistants and make the compensation due for their services a charge against the state as a liquidated claim. Any other conclusion would be to put the court in the attitude of a petitioner to the board of examiners from time to time, and thus reduce it from its position as a co-ordinate branch of the government to the level of the ordinary citizen who deserves or claims payment for services rendered. But, fortunately, we are not compelled to resort to the assertion of our inherent power. The legislature, recognizing the fact that the court has the power by which it may supply its own necessities, enacted section 6248 of the Revised Codes. It provides: " * * * If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court, or any two justices thereof, may direct the clerk of the supreme court to provide such rooms, attendants, furniture, lights, fuel and stationery; and the expenses thereof, certified by any two justices to be correct, must be paid out of the state treasury, out of any funds in the state treasury not otherwise appropriated." In case no provision had been made for a stenographer, there would have been furnished by this section a mode by which one could have been secured, as well as the power to fix and order his compensation paid. This provision indicates recognition on the part of the legislature of the necessity that this court should be free from any control in the selection of its assistants in case it should itself have failed to make suitable provision for them. Can it properly be said that,

since it has made provision, the situation is different? Whatever application section 262, *supra*, may have to the help employed in the executive department, it cannot have, and was not intended to have, any application to the necessary employees attached to this court. This court, viewed as a department of the state government, is neither an officer nor a board, and therefore does not fall within the terms of this provision. It may well be said that in enacting it the legislature, prompted by motives of economy, deemed it wise to lodge in the board of examiners the discretionary power to determine when an officer of the executive department needs clerical assistance, as well as the amount that shall be expended for it, thus leaving it to the board to say whether any part of an amount appropriated in that behalf shall or shall not be expended. This may not in any way encroach upon the powers of the officers of that department, for the board belongs to that department. But the legislature could with no more propriety lodge in that department the power to appoint the employees of this court than it could empower this court to appoint the employees of the various executive officers.

The provision of the Constitution, *supra*, cited as a justification of the action of the board, has no application to a claim such as the one here involved. Nor has section 226, Revised Codes, which declares, in the form of a statute, the prohibition embodied in the Constitution. Both apply to unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of the government having authority to fix them. In this case relator's claim was fixed by the legislature by appropriation of the amount named in the general appropriation bill. The relator was retained in his position because of this fact. His claim is therefore not an unliquidated claim within the class which must be approved by the board of examiners. The relator is *pro hac vice* during his employment an officer of the court, and as such his compensation has been fixed by law—not, indeed, in the sense that there is a particular statute declaring in terms what his

compensation shall be, but by virtue of his continued employment under appointment by this court. He is therefore entitled to the amount so fixed.

Nor is it to the point that the general appropriation bill declares that the sums named therein, or "so much thereof as may be necessary," are appropriated for the purposes named. The expression "so much thereof as may be necessary" is not appropriate to any sum mentioned, if such sum has been fixed by law, but, if the expression is addressed to any department of the government, it must be held to be addressed to that department which has the disbursement of the particular sum; so that, so far as it must control the disbursement of the sum appropriated for the employment of a stenographer by this court, the expression is addressed to this court. For illustration: At its last session the legislature, among others, made an appropriation of \$10,000, or so much thereof as might be necessary, to pay the incidental expenses of the session. The various claims provided for were properly not regarded by the board of examiners as claims against the state, which it should audit and allow; nor did the auditor hesitate to draw his warrant upon the certificate of the proper disbursing officers of the legislature. These views are so clearly just that it would seem unnecessary to cite any authority in support of them. They have been expressed by the courts generally whenever the same or similar questions have arisen. (*White v. Hughes County*, 9 S. D. 12, 67 N. W. 855; *In re Appointment etc.*, 35 Wis. 410; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *Rogers v. Brown et al.* (D. C.), 136 Fed. 813.)

Let the writ issue as prayed for.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. CROWE, APPELLANT.

(No. 2,658.)

(Submitted May 8, 1909. Decided May 25, 1909.)

[102 Pac. 579.]

Criminal Law—Assault in First Degree—Insanity—Erroneous Instructions—Burden of Proof—Verdict—Witnesses—Cross-examination—Degrading Character—Hypothetical Questions.

Criminal Law—Cross-examination—Witnesses—Degrading Character.

1. The court erred in overruling objections of defendant, charged with crime, to questions asked his (defendant's) brother by the county attorney, on cross-examination, whether he was the same Pat Crowe who had been connected with the Cudahy kidnaping, and whether he had not been more or less directly implicated in other offenses of like character. The questions had a tendency to degrade and discredit the witness. (MR. JUSTICE SMITH dissenting.)

Same.

2. It was also error to permit the witness above referred to, to be asked on cross-examination whether he knew of his brother, the defendant, ever having been involved in difficulty or been defendant in a criminal proceeding before.

Same—Insanity Preceding Offense—Evidence—Discretion.

3. Where the defense relied on by one charged with crime is insanity, the length of time preceding the offense to which inquiry relative to defendant's mental condition may be directed is a matter addressed to the sound legal discretion of the trial judge, subject to review for abuse of such discretion only.

Same—Insanity—Evidence—Admissibility.

4. A lay witness having testified that in his opinion defendant was of unsound mind at the time the offense charged was committed, it was proper to ask him on cross-examination whether he thought defendant had sufficient mental capacity to distinguish between right and wrong and would know that it was wrong to shoot a man, or steal or commit burglary.

Same.

5. The witness mentioned in paragraph 4, above, having answered the question in the affirmative, he should have been allowed on redirect examination to give his opinion as to whether defendant, if he knew it was wrong to do the things enumerated, had sufficient mental capacity to do right and avoid wrong; since defendant could not have anticipated the extent of the cross-examination, and therefore could not, in his direct examination, cover every possible phase of insanity which might be opened to inquiry.

Same—Insanity—Irresistible Impulse.

6. Where defendant on trial for crime relies on the defense of insanity, the question of irresistible impulse is a proper subject of inquiry.

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Same—Hypothetical Questions—Contents.

7. A hypothetical question on the subject of defendant's insanity need not embrace all the evidence given relating to his mental condition.

Same—Insanity—Instructions—Burden of Proof.

8. In instructing the jury in a criminal action that the defense of insanity "is to be weighed fully and justly, and, *when satisfactorily established*, must recommend itself" to their favorable consideration, etc., the court impliedly cast the burden of satisfactorily establishing that defense upon the defendant, and therefore committed error. (MR. JUSTICE SMITH dissenting.)

Same—Insanity—Disparagement of Defense by Court—Erroneous Instruction.

9. It was also error to instruct that the jury should examine the defense of insanity "with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt." The defendant is entitled to make any defense recognized by the law and have it submitted without disparagement by the court. (MR. JUSTICE SMITH dissenting.)

Same—Insanity—Instructions—Burden of Proof.

10. An instruction that, before the jury could acquit upon the ground of insanity, they must find defendant was laboring under such a defect of reason from disease of the mind as to not know—that is, as not to have sufficient mental capacity to know—the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong, and one which declared that, before acquittal could be had on that ground, it must appear that defendant was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment, while not inconsistent when viewed in the light of the whole charge, were so vague in language that the jury might reasonably have inferred from them that defendant had the burden of establishing his insanity.

Same—Insanity—Reasonable Doubt.

11. The court further erred in charging the jury that it was for them to say whether the evidence, as a whole, convinced them of defendant's insanity, or raised in their minds a reasonable doubt on the subject. The instruction was objectionable because couched in the alternative. The only matter which should have been submitted for their determination was whether the evidence as a whole raised a reasonable doubt of defendant's sanity.

Same—Insanity—Verdict of Acquittal—Form.

12. Where defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that they might find defendant guilty of assault in the first, second or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." (Revised Codes, sec. 9322.)

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ANTHONY J. CROWE was convicted of assault in the second degree and appeals. Reversed and remanded for new trial.

Messrs. Hatthorn & Brown, for Appellant.

A layman may be permitted to testify as to the sanity or insanity of a defendant, he first having detailed the facts upon which he bases his conclusion. (*State v. Schuff*, 9 Idaho, 115, 72 Pac. 664; *Connecticut M. L. Ins. Co. v. Lothrop*, 111 U. S. 612, 28 L. Ed. 536; *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930; *Burt v. State*, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305; *People v. Young*, 151 N. Y. 210, 45 N. E. 460; Elliott on Evidence, 681, and cases cited.)

A witness is entitled to be examined and give his testimony without having questions propounded to him which tend to degrade him or lower him in the estimation of the jury. (*State v. Rogers*, 31 Mont. 1, 77 Pac. 293; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294; *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *People v. Wells*, 100 Cal. 459, 34 Pac. 1078; *Gale v. People*, 26 Mich. 161; *People v. Cahoon*, 88 Mich. 456, 50 N. W. 384; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *State v. Trott*, 36 Mo. App. 29.)

An expert witness has a right to express his opinion as to the sanity or insanity of a person from the facts propounded in the hypothetical question. (*State v. Schuff*, *supra*; *Lowe v. State*, 118 Wis. 641, 96 N. W. 417; 2 Elliott on Evidence, sec. 1116.)

The object of all questions to experts should be to obtain their opinion as to matters of skill and science which is in controversy, and at the same time to exclude their opinions as to the effect of evidence in establishing controverted facts. (2 Elliott on Evidence, sec. 1116; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Hunt v. Lowell Gaslight Co.*, 8 Allen (Mass.), 169, 85 Am. Dec. 697.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of assault in the second degree, and appeals from the judgment and from an order denying him a new trial.

1. Upon the cross-examination of Pat Crowe, a brother of the defendant and a witness in his behalf, he was asked by the county attorney: "Are you the same Pat Crowe who was connected with the Cudahy kidnaping in Omaha?" And again: "You have been more or less directly connected with other offenses of the same character for the past eighteen years, have you not?" To each of the questions counsel for the defendant objected, but the objection was overruled. In each instance the ruling was erroneous. Sections 8030 and 8031, Revised Codes, provide:

"Sec. 8030. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

"Sec. 8031. It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue."

Sections 8024 and 8025 provide the method of impeaching a witness. Section 8024 provides that a witness may not be required to give evidence of particular wrongful acts, except that it may be shown by his examination, or the record of the judgment, that he has been convicted of a felony. The provisions of section 8025 have no reference to the matter now before us.

In view of these provisions of law it is immaterial what rule may prevail in other states where the common law is, or different statutes are, in force. "In this state there is no common law, in any case where the law is declared by the Code or the statute." (Section 8060.) "The Code establishes the law of this state respecting the subjects to which it relates." (Section 8061.)

But it is suggested by counsel for the state that a wider latitude is allowed in the cross-examination of an ordinary witness than is permitted in the cross-examination of the defendant in a criminal case, and Wigmore on Evidence, sections 979-986, is cited in support of this contention. That rule may apply in other jurisdictions, but it does not in this state. In *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927, this court said: "When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness." In *State v. Rogers*, 31 Mont. 1, 77 Pac. 293, a similar question arose. Joe Rogers was on trial for burglary. His brother, Pat Rogers, was a witness in his behalf, and testified about a trip taken to Storm Lake by way of Cable. On cross-examination Pat Rogers was questioned about his purchase of a Lee straight-pull rifle, and was then asked: "Is it not a fact that when you went to Cable—when you took that trip—that your object was to find out when the bullion was to be shipped from Cable?" And again: "Now, Mr. Rogers, didn't you get that Lee straight-pull rifle for the purpose of holding up the bullion that was going from the Cable mine?" Speaking of that character of cross-examination, this court said: "A witness, whether the accused or any other witness, may be discredited in any of the various ways named in the statute or sanctioned by law, but it is not permissible to ask any witness any question merely for the purpose of degrading him. It is the right of a witness to be protected from irrelevant, improper, and insulting questions (section 3402, Code of Civil Procedure), and he need not give an answer which will have a tendency to subject him to punishment for a felony, or to degrade his character, unless it be to the very fact in issue, or to a fact from

which the facts in issue would be presumed. (*Id.*, sec. 3401.) These questions were totally foreign to the matter before the court, and could have no bearing whatsoever on the guilt or innocence of the defendant of the crime with which he was accused by the information. They could therefore subserve no purpose whatsoever, except to degrade and discredit the witness and his brother, the defendant, in the eyes of the jury"—and for that error alone the judgment was reversed, and the holding of the trial court with respect to the cross-examination of Pat Crowe must, for the same reason, be held to be reversible error. For the same reason the following questions, asked the witness Pat Crowe, ought not to have been permitted to be answered: "Do you know, Mr. Crowe, of your brother, the defendant, ever having been involved in a difficulty of this kind before?" And again: "Do you know of your own knowledge, Mr. Crowe, as to whether or not your brother, during the time you have known him, has ever been a defendant in any criminal proceedings before?"

2. The defense relied upon was insanity. Pat Crowe was interrogated with reference to the mental condition of his brother, but was prevented from expressing an opinion as to whether his brother was sane or insane at the time the alleged offense was committed, or at the times the witness had known him. The evidence is very indefinite as to the length of time which had elapsed since the witness had known anything of his brother; and, while the law does not fix any limit of time within which the inquiry as to the mental condition of one accused of crime is to be directed, the rule most generally recognized appears to be to refer the matter to the sound legal discretion of the trial court, subject to review for abuse of such discretion only. (1 Wigmore on Evidence, sec. 233.) We do not think that the record discloses any abuse of discretion in this instance.

3. Neither are we prepared to say that the remarks of the trial judge to the witness Le Masters were of such character as to constitute reversible error. (Revised Codes, sec. 9415.)

4. Le Masters was a witness for the defendant, and in his direct examination testified to his acquaintance with the defendant, his observations of defendant's conduct, and gave as his opinion that the defendant was of unsound mind at the time the alleged offense was committed. On cross-examination he was asked if he thought the defendant had sufficient mental capacity to distinguish between right and wrong, and, further, if he thought defendant would know it was wrong to shoot a man or steal or commit burglary. The witness answered: "I believe that he knew in his own mind that it was wrong to do any of those things." On redirect examination the witness was asked his opinion as to whether the defendant, if he knew it was wrong to do these things, had sufficient mentality or mental capacity to do right and avoid wrong. This was objected to as not proper redirect examination, and the objection was sustained. It is now urged that the cross-examination of the witness was improper, but with this we do not agree. It tended to show the mental capacity of the defendant to distinguish between right and wrong generally, and also in particular instances. But we think the court erred in refusing to permit the question asked the witness on redirect examination. The defendant could not have anticipated the extent to which counsel would go in the cross-examination, and therefore on direct examination could not cover every possible phase of insanity which might be opened to inquiry, and certainly irresistible impulse is a proper subject of inquiry in insanity cases. This court has repeatedly so held. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362.)

5. Dr. Lindsey was called by the defendant as an expert witness on the subject of insanity, and to him was propounded a hypothetical question in which was recited much of the testimony relating to defendant's family history, and to his own habits and history. The county attorney objected to the question, on the ground that it did not embrace all the testimony given tending to show the mental condition of the defendant.

The court having intimated its views, counsel for defendant then inquired of the court whether it would hold that it was necessary to incorporate in one hypothetical question all such testimony, and the court ruled that it would be necessary for counsel to do so. This ruling is assigned as erroneous. In *State v. Peel*, above, this court considered the question in a somewhat different aspect. To the hypothetical question propounded to a witness for the state counsel for defendant objected, "on the ground that the hypothesis assumed that the defendant entertained a grudge against deceased, and that he was lying in wait for deceased at the time of the homicide, an assumption not justified by the proof, and also on the ground that it involved an erroneous statement of the law of insanity as a defense in criminal prosecutions." Considering an exception taken by the defendant to the order of the court overruling the objection, this court said: "The state's theory of the case was that defendant was, and is, so far a reasonable moral agent as to be responsible under the law. Upon this assumption counsel were proceeding, and it was necessary that they be allowed to proceed in this way in order to properly try the case. In putting the hypothetical question to the expert they had a right to assume as established, for the time being, all the facts in evidence tending to support their theory. It was a legitimate inference from the evidence, under this theory, that the defendant retained a grudge against the deceased, and that, prompted by a desire to gratify his feelings of revenge, he lay in wait for the opportunity to strike the fatal blow. It was for the jury to say, after considering all the evidence introduced by both sides, whether the facts, thus assumed as established for the time being, were really established, and whether the opinion of the witness was worthy of consideration. (Lawson on Expert Evidence, 152, 153; 1 Thompson on Trials, secs. 607-610, and cases cited.) Counsel were not compelled to so frame their question as to embrace in it a statement of all the elements of the law of insanity."

The authorities appear to be practically unanimous in holding that a hypothetical question need not embrace all of the evidence respecting the defendant's mental condition. In *Davidson v. State*, 135 Ind. 254, 34 N. E. 972, the supreme court of Indiana, in considering the identical question now before us, said: "As to the second objection it would seem to be sufficient to say that it was not necessary that the hypothetical questions propounded to the witnesses should embrace all the facts proven upon the particular subject under investigation. In the examination of expert witnesses counsel may embrace in his hypothetical question such facts as he may deem established by the evidence; and, if opposing counsel does not think all the facts established are included in such question, he may include them in questions propounded on cross-examination. Any other course would result in endless wrangles over the question as to what facts were, and what facts were not, established. (*Goodwin v. State*; 96 Ind. 574; Rogers on Expert Testimony, 39; *Stearns v. Field*, 90 N. Y. 640.)" To the same effect is *Schissler v. State*, 122 Wis. 365, 99 N. W. 593. (Lawson on Expert and Opinion Evidence, p. 260, subrule 1.)

6. Instruction No. 30, given by the court, reads as follows: "You are instructed that the defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt." At an early date this instruction was approved in Indiana and California, but lately it has been distinctly disapproved in each state. (*Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; *People v. Methever*, 132 Cal. 326, 64 Pac. 481.) The instruction is held to be erroneous in *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664. In our opinion, there

are two insuperable objections to the instruction: (1) It casts upon the defendant the burden of satisfactorily establishing his insanity. The phrase "this is a defense to be weighed fully and justly, and, when *satisfactorily established*, must recommend itself," etc., cannot have any other meaning. The state is never required to satisfactorily establish the defense of insanity; so the jury must have understood that it was incumbent upon the defendant to do so. This is the law in some of the states, but is not the rule here. The question was fully considered, and argument upon it foreclosed, in the *Peel* and *Keerl Cases* above. (See, also, *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.) (2) The instruction is a disparagement of the defense of insanity; and, when the jury are told to examine it with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt, their suspicions must have been at once aroused as to the merits of such a defense in any case. Instructions of this character have been condemned frequently, and ought never to be given. (*Dawson v. State*, 62 Miss. 241; 2 Thompson on Trials, sec. 2433; *Aszman v. State*, above.) The defendant is entitled to make any defense recognized by the law, and to have it submitted without disparagement by the court. (12 Cyc. 618.)

7. In Instruction 33 the court told the jury that, before they could acquit the defendant upon the ground of insanity, they must find that the defendant was "laboring under such a defect of reason from disease of the mind as to not know—that is, as not to have sufficient mental capacity to know—the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong." In Instruction 28 the jury were told that, before they could acquit the defendant on the ground of his insanity, it must appear that the defendant was "affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment." While these separate statements might, at first blush, seem to be inconsistent, they are

not so in fact; and the jury having been told that they were to consider the charge as a whole, criticism upon the ground of their inconsistency cannot be urged, but from the vague language employed in each of them, the jury might reasonably have inferred that the burden was upon the defendant to establish the fact of his insanity. The same thing may be said of Instruction 34, given. There the court, among other things, said: "And it is for you, and you alone, to say whether or not the evidence introduced in this case as a whole convinces you of the *defendant's insanity*, or raises in your mind a reasonable doubt as to his sanity." The question ought not to have been submitted to the jury in the alternative form; for the only matter for their determination was as to whether the evidence as a whole raised a reasonable doubt of defendant's sanity. The *Peel* and *Keerl Cases*, above, are ample authority in support of appellant's contention.

8. Instruction 36, given, is not accurate. It informed the jury that they might find either of four verdicts: "(1) Guilty of assault in the first degree; (2) guilty of assault in the second degree; (3) guilty of assault in the third degree; (4) not guilty." Section 9322, Revised Codes, provides: " * * * When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be 'not guilty by reason of insanity.' * * * " Since the defendant was relying upon the defense of insanity, the jury should have been told that they might find the defendant not guilty by reason of insanity.

We have not considered all the assignments, but think the foregoing sufficient for the purpose of a retrial of this case.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH: I do not think the error first discussed by Mr. Justice Holloway was sufficiently prejudicial to warrant

a reversal. Neither do I think the court's admonition to the jury touching the defense of insanity was, in itself, reversible error. In other respects I concur in the disposition made of the case.

MCAULEY, RESPONDENT, v. CASUALTY COMPANY OF AMERICA, APPELLANT.

(No. 2,650.)

(Submitted May 4, 1909.. Decided June 1, 1909.)

[102 Pac. 586.]

Life and Accident Insurance Policies—Construction—Proximate Cause of Death—Evidence—Street-cars—Passenger—Proof of Death—Mailing—Presumptions—Pleadings—Amendments—Hypothetical Questions.

Life and Accident Insurance Policies—Ambiguity—Construction.

1. Where the terms of a life and accident insurance policy are so ambiguous and involved as to be almost unintelligible, they should be liberally construed in favor of the insured.

Same—Law of the Case—Estoppel.

1a. Where at the first trial of a cause counsel for both parties proceeded upon a certain theory touching the meaning of the terms of an insurance policy, and on appeal the question of its proper construction was not raised in or considered by the appellate court, its decision cannot be said to be the law of the case on such point, and plaintiff was, therefore, not estopped to contend for a different construction on the second trial.

Same—Proximate Cause of Death—Evidence—Sufficiency.

2. In an action on a life and accident insurance policy under the terms of which the beneficiary was to be indemnified in case the assured, while riding as a passenger on a street-car, was injured and should die in consequence of such injury, evidence which showed that the assured injured her leg while alighting from a car and died from erysipelas, which disease experts testified could only be introduced into the system through an abrasion of the skin, was in the absence of any testimony that the disease had been communicated through any other means, sufficient to show that the injury to her limb was the proximate cause of her death.

Same—Passengers—Evidence—Sufficiency.

3. Although there was no direct testimony that the deceased was a passenger on the car in alighting from which she was injured, evidence that it stopped at her home and she alighted, sufficiently showed that fact, nothing appearing that it stopped for any other purpose.

Same—Proof of Death—Mailing—Presumptions.

4. Where proof of death was mailed to the home office of defendant insurance company at New York by registered letter, the presumption obtains that it was received in due course of mail.

Same—Pleadings—Amendment at Trial.

5. Plaintiff, in an action on an insurance policy, was properly allowed to amend his complaint at the trial by the allegation that "he had duly performed each and all of the obligations in said contract on him binding."

Same—Pleadings—Amendments at Trial—Relation Back.

6. An insurance policy provided that unless action upon it was commenced within six months after it accrued, it should be barred. Assured died October 24, 1906, and the beneficiary commenced suit on April 24, 1907. At the trial, on October 23, 1907, he was permitted to amend his complaint by inserting that he had duly performed all obligations made binding upon him in the contract. *Held*, under *Clark v. Oregon Short Line R. E. Co.*, 38 Mont. 177, that the original pleading was sufficiently substantial to permit of its being amended so as to fully state the same cause of action attempted to be stated in the first instance; that the amendment related back to the date at which the complaint was filed, and that therefore the contention that the action was barred because the complaint never stated a cause of action until after amendment, had no merit.

Same—Evidence—Hearsay—Harmless Error.

7. Plaintiff, the husband of deceased, having testified that he saw she was injured in alighting from the car, the admission of a statement by her, made to him at the time, that she had been hurt, was not prejudicial error.

Same—Hypothetical Questions—Contents.

8. A hypothetical question to an expert need not embody all the testimony on the subject to which it relates.

Same—Expert Evidence—Hypothetical Question.

9. The hypothetical question: "If the woman died from erysipelas, what relation, in your opinion, as a physician and surgeon, did the scratch or abrasion have to her death?" to which the answer was: "It served as a point of entrance into the system of the germ of erysipelas"—was not objectionable as calling for the ultimate conclusion to be reached by the jury, to-wit, whether the injury which produced the abrasion, was the direct and proximate cause of the woman's death.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by John McAuley against the Casualty Company of America. Judgment for plaintiff. Defendant appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellant.

"The construction placed upon a written contract by the appellate court on a former appeal is the law of the case and de-

cisive of the question on a subsequent trial." (*Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713; *Hiatt v. Brooks*, 17 Neb. 33, 22 N. W. 73; *Kane v. Rippey*, 22 Or. 299, 29 Pac. 1005; *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553; *O'Rourke v. Schultz*, 23 Mont. 285, 58 Pac. 712.)

Plaintiff had the burden of proving that deceased was hurt while being a passenger on the street-car, and that if erysipelas resulted from the scratch it must have been introduced into her system by some means for which defendant was responsible. (See *National Masonic Accident Assn. v. Shryock*, 73 Fed. 774, 20 C. C. A. 3; *Barry v. United States Mut. Assn.*, 23 Fed. 712; *Western Com. T. Assn. v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; *Bacon v. United States M. A. Assn.*, 123 N. Y. 304, 20 Am. St. Rep. 748, 25 N. E. 399, 9 L. R. A. 617; *Continental Casualty Co. v. Peltier*, 104 Va. 222, 51 S. E. 209.)

The amendment to the original complaint was erroneously allowed. At all times prior to the amendment the complaint stated no cause of action. At the trial a new material issue was for the first time raised under the amendment. This cannot be done. (*Wormall v. Reins*, 1 Mont. 627.) The period of six months, provided by the policy of insurance, wherein this action must be commenced, had long since expired when the amendment was allowed, and such allowance thereby deprived the defendant of the benefit, which the lapse of time had given it. (*Smith v. Smith*, 45 Pa. 403; *Trego v. Lewis*, 58 Pa. 463; *Tyrrill v. Lamb*, 96 Pa. 464; *Miller v. Bealer*, 100 Pa. 583; *City of Philadelphia v. Hestonville, M. & F. Pass. R. Co.*, 203 Pa. 38, 52 Atl. 184; see, also, *Doyle v. City of Sycamore*, 193 Ill. 501, 61 N. E. 1117; *Missouri M. K. & T. Ry. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A., n. s., 259; *Blake v. Minkner*, 136 Ind. 418, 36 N. E. 246, 248; *Lilly v. Charlotte C. & A. R. Co.*, 32 S. C. 142, 10 S. E. 932; *Box v. Chicago etc. Ry. Co.*, 107 Iowa, 660, 78 N. W. 694.)

The court erred in admitting plaintiff's testimony relative to statements made to him by deceased.

It was hearsay and incompetent, no part of the *res gestae*, and a mere narrative of a past transaction. (*McKeigue v. City of Janesville*, 68 Wis. 50, 31 N. W. 298; *People v. Ah Lee*, 60 Cal. 85; *Mayes v. State*, 64 Miss. 329, 60 Am. Rep. 58, 1 South. 733; *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35; *Williams v. Southern Pac. Co.*, 133 Cal. 550, 65 Pac. 1100.) The purported declarations were neither spontaneous nor voluntary. They were in response to questions asked, and were clearly narrative of a past event, in no sense explanatory of the principal fact, or connected with it. (*Herren v. People*, 28 Colo. 23, 62 Pac. 834; *Guild v. Pringle*, 130 Fed. 419, 64 C. C. A. 621; *Chicago etc. Ry. Co. v. Becker*, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; *Martin v. New York etc. Ry. Co.*, 103 N. Y. 626, 9 N. E. 506; *Elguth v. Grueszka*, 57 Ill. App. 193; *Leistriz v. American Z. Co.*, 154 Mass. 382, 28 N. E. 294; *Parsons v. Yaeger Mill Co.*, 7 Mo. App. 594; *Leahey v. Cass etc. Ry. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; *Lahey v. Ottoman & Co.*, 73 Hun, 61, 25 N. Y. Supp. 897; *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 South. 577; *Lissak v. Crocker*, 119 Cal. 444, 51 Pac. 688; *State v. Deuble*, 74 Iowa, 509, 38 N. W. 383; *Atkinson etc. Ry. Co. v. Logan*, 65 Kan. 748, 70 Pac. 878; *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106; *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194.)

Messrs. Maury & Templeman, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

For a statement of the facts in this case, see *McAuley v. Casualty Co.*, 37 Mont. 256, 96 Pac. 131. The case is again in this court on defendant's appeal from a judgment entered against it, on verdict of a jury, and from an order denying its motion for a new trial.

The clauses of the contract which are invoked by the plaintiff to fix a liability on the defendant, read as follows: "(A) In case the assured [Jno. McAuley] shall, during the term of this insurance, sustain bodily injuries effected solely through ex-

ternal, violent and accidental means * * * which injuries shall, directly and independently of all other causes, result in loss of life, limb, sight or time, as herein defined, the company will pay the amounts below specified: [Here follow specifications.] (B) If these injuries are received while riding as a passenger in or on a public conveyance, provided for passenger service, and propelled by steam, compressed air, gasoline, naphtha, electricity, or cable, including passenger elevators, or while in a burning building, the amounts otherwise payable under clause A shall be doubled." Then follow clauses C, D, and E, relating to "Special Indemnity," "Optional Indemnity," and "Medical or Surgical Treatment." Then clause F: "If one person over eighteen and under sixty years of age other than the assured is specifically named as beneficiary [in this case Annie McAuley] in the schedule of warranties hereinafter contained, then, and not otherwise, this policy shall also, in consideration of the premium insure the person so named against disability or death caused directly in the manner set forth in clause B, as follows: 'If the death of the beneficiary shall so occur within ninety days from said injuries, the company will pay to the assured the principal sum; or if the beneficiary shall thus suffer loss of limb, or sight, the company will pay to the beneficiary the amount named in clause A for such injury,' " etc.

It was assumed by counsel for defendant upon the first appeal, and not controverted by the plaintiff, that, in order to recover for the death of Annie McAuley by virtue of clause F, it was necessary for the plaintiff to show that the death was caused from bodily injuries which, independently of all other causes, resulted in such loss of life. This court proceeded upon the theory that such interpretation of the contract was the correct one, as is disclosed by the opinion subsequently rendered. Upon the second trial counsel for the respondent contended for a different construction, and the trial court, being of the opinion that the contract would not bear the interpretation originally placed upon it by defendant, refused to instruct the jury, as

requested by defendant's counsel, that plaintiff could not recover unless he proved that the injury received by Mrs. McAuley "directly and independently of all other causes resulted in her death." In lieu of these instructions,—there were several covering the same point,—the court advised the jury that plaintiff could not recover unless he established to the satisfaction of the jury, by a preponderance of the evidence, "that the injuries sustained by Mrs. McAuley were the direct and proximate cause of her death." The contract, on this point, is so involved in its terms as to be almost unintelligible. A literal interpretation thereof seems to sustain the position taken by the trial court. Clause F refers in terms to "death * * * caused directly in the manner set forth in clause B," without any qualification; and clause B may, perhaps, be said to refer to the manner in which the injury occurs, as well as to the place of its occurrence. The terms of the policy are, to say the least of them, ambiguous. It is difficult to determine which of the respective theories of interpretation contended for by the parties is correct. Under these circumstances the policy should be liberally construed in favor of the insured. (*Holter Lumber Co. v. Fireman's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207.)

But it is contended by the appellant that (1) the plaintiff at the first trial adopted the theory that the contract provided that the injury to Mrs. McAuley must have produced her death independently of all other causes; and (2) that this court placed that construction upon the contract in deciding the first appeal. We have searched the record on the former appeal for any evidence that the plaintiff committed himself to, or contended for, such construction; and, so far as this court is concerned, it is enough to say that the point was not raised or considered. Counsel for the respondent, who argued the case at the hearing of this appeal, frankly stated that he probably misled the court at the time the first appeal was argued, by not raising the question, for the reason that he had not at that time discovered that the defendant had placed an erroneous construction upon the

policy. We find no error on the part of the court below in relation to the instructions of which complaint is made.

Appellant earnestly contends that there is no evidence in the case which would warrant the jury's finding that the death of Mrs. McAuley resulted from injuries received while riding as a passenger on the street-car. It is asserted that in this regard the present case is the same as that made at the first trial, and the language of the court in the original opinion is relied on. But counsel have failed to consider, or at least they have not quoted in their brief, the entire passage on the subject. The court said: "Whether the disease was introduced into her system through the scratch she received, or whether its baneful properties slumbered in her blood prior to that time, whether it was communicated to her body from her clothing or a bandage, or from some projecting portion of the car, we do not know, the doctors did not know, and the jury could not know." Not for the purpose of deciding this appeal, but for our own information, we have examined some of the older medical works on the subject of the disease, erysipelas. We find it there stated that some persons are susceptible to erysipelas. It is often stated by laymen that an individual is "subject" to erysipelas. We know of persons who have suffered from the disease many times, and in whom it is said to "break out" at certain seasons. The record discloses that, at the first trial, Dr. McDonald testified: "It [erysipelas] most frequently enters the system through an avenue of abrasion; through the surface. It frequently appears where there is no abrasion at all." In this state of the record the court was clearly justified in concluding that a person could become ill from erysipelas in some manner other than by inoculation from an outside germ, through an abrasion of the skin. And the difference is vital, for the reason that the jury would not be justified in guessing whether the death resulted from a disease introduced into her system through the hurt to her leg at or about the time she was injured by the street-car, or whether she died from a disease which she already had, but which first manifested itself at the time of the injury,

as the jury was compelled to do under the testimony on the first trial. (See *Barry v. Accident Assn.* (C. C.), 23 Fed. 712; *National M. Assn. v. Shryock*, 73 Fed. 774, 20 C. C. A. 3.) But we have a different record on this appeal. All of the testimony now shows, in effect, that a person can contract erysipelas in but one way, to-wit, by the introduction of the germ of the disease through an abrasion of the skin. The only logical conclusion is, therefore, that Mrs. McAuley died from erysipelas,—which, the doctors said at the trial, is a form of blood poisoning,—caused by the germs of that disease entering her system through the abrasion of the skin of her leg, which she suffered in alighting from the street-car.

But it is contended by the appellant that this is not sufficient to fix a liability upon it under its contract, for the reason, as they suggest, that the disease germs may have been communicated to the hurt, not at the time of the accident, but from the hands of her husband, or from the bandages or liniment which were immediately thereafter used and applied. But we are of opinion that this contention of the appellant cannot be sustained. These contracts of insurance, like all others, must be construed with a view to carrying out the intention of the parties. (Revised Codes, sec. 5025: Richards on Insurance Law, secs. 384 *et seq.*) The manifest intention of these parties was that, if Mrs. McAuley was injured while riding as a passenger on a street-car, plaintiff should be indemnified, to a certain extent, for his loss. That the disease germs were communicated to Mrs. McAuley's leg from the hands of her husband, or from the bandages or liniment, is mere conjecture; there is no word of testimony on the subject. The jury found that she injured her leg at the time and place in question, and the proof shows that erysipelas manifested itself within the usual time. If a man not learned in the medical profession—one of the neighbors, for instance—were asked what caused Mrs. McAuley's death, he would undoubtedly reply that she scratched her leg getting off a street-car, and that blood poisoning set in, from

which she died. This is the way people generally understand these matters; and why should the courts adopt any other or different method of looking at the ordinary affairs of life? The injury and the erysipelas and the death are proven facts in the case. If Mrs. McAuley had not injured her leg in alighting from the car, there would have been no occasion to apply bandages or liniment, and the probabilities are she would still be alive. The defendant company induced the plaintiff to insure the life of his wife against accidental death—he paid the premium, and she thereafter died from the effects of an accidental injury—and we have no hesitancy in agreeing with the jury that the injury to her leg was the proximate cause of her death. (See *Western Com. Travelers' Assn. v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *Nax v. Travelers' Ins. Co. (C. C.)*, 130 Fed. 985; *Ward v. Aetna Life Ins. Co. (Neb.)*, 118 N. W. 70; *Cary v. Preferred Acc. Ins. Co.*, 127 Wis. 67, 115 Am. St. Rep. 997, 106 N. W. 1055, 5 L. R. A., n. s., 926.)

It is suggested by the appellant that there is no evidence that Mrs. McAuley was a passenger on the car. It is true that no one testified directly that she was; but the testimony shows that the car stopped at her home, and she alighted. There is no evidence that the car stopped for any other purpose, and we do not think that the jury would have been justified in arriving at any conclusion other than the one embodied in their verdict for the plaintiff. They were charged by the court that she must have been a passenger in order to warrant a verdict in plaintiff's favor.

The next contention is that the evidence is insufficient to justify a finding that proof of death was furnished within two months. Mrs. McAuley died on October 24, 1906. On November 27 following the plaintiff mailed the proofs of death to the defendant company at its home office in New York. The letter was registered. The presumption is that it was received in due course of mail, and, indeed, a letter dated December 7,

1906, from the defendant company to the plaintiff, shows conclusively that the proofs were received.

This action was commenced on April 24, 1907; on October 23, 1907, at the trial, plaintiff was, over defendant's objection, allowed to amend his complaint by alleging that "he had duly performed each and all of the obligations in said contract on him binding." Defendant then objected to the introduction of any testimony in support of the allegations of the complaint, for the reason "that at all times prior to the amendment the complaint did not state facts sufficient to constitute a cause of action, and that on October 23, 1907, the complaint for the first time stated a cause of action; that the amendment could not relate back to the original date at which the complaint was filed or said cause commenced, so as to arrest the running of the six months provided in the policy sued upon, within which said action must be commenced, and for the further reason that the amendment varied the alleged cause of action set forth in the complaint, and that the amendment, so allowed over the objection of the defendant, was a material alteration, and its omission from the original complaint is fatal." The amendment was, we think, properly allowed, and the other point was decided adversely to the appellant's contention in *Clark v. Oregon Short Line R. Co.*, 38 Mont. 177, 99 Pac. 298.

The following extract from the record will illustrate the appellant's next assignment of error: Plaintiff, testifying, said: "I saw that she got hurt getting off, and went and met her, and helped her get into the house, and she told me what happened. I see it happened myself." The witness was then allowed to state, over the objection of defendant's counsel, that when he met his wife, not over one-half minute after she alighted from the car, she told him that "she got hurt on the leg getting off the street-car on the step." It is now insisted that this testimony was hearsay; that the statement of Mrs. McAuley was no part of the *res gestae*, and the admission of the evidence was prejudicial error. We cannot so hold. It is unnecessary to decide whether or not the statement was a part of the *res gestae*,

for the reason that, in view of the fact that plaintiff had already testified that he saw that she received an injury at the time, the admission of her statement that she did receive such injury could not have influenced the jury or prejudiced the defendant. The admission of the testimony, even though error, was not sufficient to justify a reversal of the order appealed from. (*Rheinheimer v. Aetna L. Ins. Co.*, 77 Ohio St. 360, 83 N. E. 491, 15 L. R. A., n. s., 245.)

Another contention of the appellant is that a hypothetical question, propounded to Dr. Allen by counsel for the plaintiff, did not embody all of the testimony on the subject to which it related, and was therefore incompetent. This assignment of error is disposed of by the decision of this court in the case of *State v. Crowe*, ante, p. 174, 102 Pac. 579. The question propounded comprehended this inquiry: "If the woman died from erysipelas, what relation, in your opinion as a physician and surgeon, did the scratch or abrasion have to the woman's death?" This portion of the question was particularly objected to, for the assigned reason that it called for the ultimate conclusion, which was exclusively for the jury to draw. The witness answered: "It served as a point of entrance into the system of the germ of erysipelas." We find no error in this ruling. There can be no question, from the testimony, that Mrs. McAuley suffered an abrasion of the skin of her leg; that erysipelas first showed itself at that point, and the abrasion became the center of the outward manifestations of the disease. As heretofore stated, the doctors all testified, in effect, that the germs of erysipelas could not "slumber in the blood," and Dr. Freund testified, on this same subject: "If there is an abrasion, and there is erysipelas, it is presumably the location and the entrance"—and plaintiff testified that there was no other abrasion on his wife's body. We think, under the circumstances, and in view of what was said by this court upon the former appeal, together with the evident necessity for expert testimony on the subject, that the question was a proper one.

We find no reversible error in the record, and the judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE
JUNE TERM, 1909.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE EX REL. PEYTON, RELATRIX, v. CUNNINGHAM, STATE
AUDITOR, RESPONDENT.

(No. 2,723.)

(Submitted June 1, 1909. Decided June 7, 1909.)

[103 Pac. 497.]

*Legislative Powers—Joint Resolutions—Creation of Offices—
Constitution—State Auditor—Mandamus.*

Offices—How Created.

1. An office can be created only by law duly enacted for that purpose.

Statutes—Constitutionality—How Determined.

2. An Act of the legislature will not be declared invalid as repugnant to the Constitution except where the repugnancy is established beyond a reasonable doubt.

Legislative Powers—Force of Joint Resolutions.

3. No Act of legislation has the force of law, even though unanimously passed and approved by the governor, unless the requirements of the Constitution (Article V, secs. 19, 20, 23), that every law shall be passed by bill, that it must have an enacting clause, and a title clearly expressing the subject of the enactment, are met; hence a resolution in the passing of which neither of these essentials has been observed, is not an authoritative expression of the legislative will upon the subject with which it deals.

Same—Joint Resolution—Creation of Office—Invalidity—Mandamus.

4. *Held*, under the rule last above declared, that House Joint Resolution No. 13 (Laws 1909, p. 390), conferring authority upon the state game warden to appoint the widow of a deputy warden, who was killed in the discharge of his duties, a deputy in addition to those authorized

by Chapter 87, Laws of 1909 (p. 118), is invalid; *held* further, on *mandamus*, that the state auditor properly refused to issue a warrant to relatrix for services performed as such deputy warden.

ORIGINAL application for *mandamus* by the state, on relation of Mrs. Charles B. Peyton, against Harry R. Cunningham, as state auditor. Writ denied.

Messrs. Walsh & Nolan, for Relatrix.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for *mandamus*. The Eleventh Legislative Assembly adopted the following resolution: "Whereas, in the month of October, 1908, Charles B. Peyton was shot and killed by Indians while in the discharge of his duty as deputy game and fish warden, and whereas, by his death his wife and three small children were left without support, and whereas, in recognition of the services rendered the state by Charles B. Peyton there is due to those who were dependent upon him some means of support, therefore, be it resolved by the House of Representatives, the Senate concurring, that the state game and fish warden appoint Mrs. Charles B. Peyton, wife of Charles B. Peyton, deceased, deputy game and fish warden for the term of four years with a salary of \$125 per month, and that the appointment be made in addition to the prescribed number of deputy game and fish wardens." (Session Laws 1909, p. 390.) Upon its approval by the governor, and on March 10, 1909, the relatrix, the person named therein, under the authority ostensibly conferred thereby, was appointed by the state game and fish warden a special deputy. She at once took the oath of office, filed the bond required by law, and has since discharged, and has been ready to discharge, the duties of the office under the direction of the state game and fish warden. Prior to the making of the application, claiming that she was and is entitled to

the salary provided for in the resolution, she demanded of the respondent, as state auditor, that he issue to her a warrant for the sum of \$83.33, the amount of salary claimed to be due her for the portion of the month of March subsequent to her appointment, and also for the sum of \$125, the amount claimed for the month of April. This demand was refused. At that time there was in the state treasury to the credit of the game and fish fund an amount of money largely in excess of the amount claimed by the relatrix, as well as of all other lawful demands against the same, and there was an unexhausted specific appropriation provided by law to meet the salaries of deputy game and fish wardens. The relatrix is, and was at the time of her appointment, a citizen of the United States, and had been a resident of the state for the time necessary to qualify her to hold the office. The purpose of this proceeding is to compel the respondent to issue to her warrants to the amounts so claimed.

Upon the return of the alternative writ, the attorney general interposed a general demurrer to the verified petition, which alleges the facts stated above. He makes two contentions: (1) That the joint resolution has not the force or effect of a statute legally and constitutionally enacted, and that, since this is so, no office was created by it, nor was the appointment made under the authority granted by it valid for any purpose; and (2) that, even if this were not so, the relatrix is not eligible to the office, because, being a woman, she is not an elector.

1. The state game and fish warden was authorized by section 1953 of the Revised Codes, to appoint not to exceed eight deputies. By an amendment enacted by the Eleventh Legislative Assembly and approved on March 5, 1909 (Session Laws 1909, p. 118, Chap. 87), this number was increased to fifteen. The resolution, it will be noted, authorized the appointment of the relatrix by name, in addition to the number already prescribed; so that, if it be accorded the force of law, the result is that the Act approved March 5 must be deemed to have been amended, and the number of deputies authorized by law for the present term of four years to be sixteen, the relatrix being, by express mention, the sixteenth.

It is elementary that an office can be created only by law duly enacted for that purpose. It is also elementary that no Act of the legislature will be declared invalid as repugnant to the fundamental law except in the clearest cases, or, as is generally said, where the repugnancy is established beyond a reasonable doubt. (*Territory v. Farnsworth*, 5 Mont. 303, 5 Pac. 869; *People ex rel. Robertson v. Van Gaskin*, 5 Mont. 352, 6 Pac. 30; *State ex rel. Harrington v. Kennedy*, 10 Mont. 410, 25 Pac. 1022; *Western Ranches Co. v. Custer County*, 28 Mont. 278, 72 Pac. 659; *State v. Courtney*, 27 Mont. 378, 71 Pac. 308.) The reason for the rule is that the power of the legislature is plenary and subject to no limitation or restriction except as declared in the state Constitution, or where exclusive control of the particular subject has been granted to the federal government; but under the Constitution the question whether an Act of legislation has the force of law does not depend merely upon the constitutional majorities of the two Houses having so determined, but also upon certain requirements to be observed as to the form in which, and the mode by which, their will is expressed. No determination can have the force of law unless these requirements have been observed. (Cooley's Constitutional Limitations, 7th ed., p. 186; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N. E. 180.)

Article V of the Constitution declares:

"Sec. 19. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose.

"Sec. 20. The enacting clause of every law shall be as follows: 'Be it enacted by the Legislative Assembly, of the state of Montana.'

"Sec. 23. No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

These provisions are to be construed as mandatory and prohibitory, because there is no exception to their requirements expressed anywhere in the Constitution. (Section 29, Article III.) Hence they are exclusive, and any expression of its will by the legislative body as law, even though it be by unanimous vote, in a form other than as therein prescribed, is void.

The resolution under which relatrix claims is not in the form of a bill. It has no enacting clause. It has no title. Therefore, though it was passed by both Houses and approved by the governor, it is of no avail as an authoritative expression of the legislative will upon the subject with which it deals. It is not, in effect, an amendment to the Act of March 5; nor, as an independent piece of legislation, can it be considered as having created an office. Addressed, as it is, to the state game and fish warden, it has not even an advisory force, since it advises him to appoint relatrix to an office which does not exist. This conclusion seems inevitable, in view of the provisions of the Constitution referred to. If the legislature may disregard these provisions, there is no other which it might not with equal propriety disregard, with the result that that branch of the government would act without limitation or restriction other than the whim or caprice of the majority. So the courts of all the states having constitutional provisions similar to them have refused to recognize mere resolutions adopted by the legislature, whether joint or concurrent, or whether approved by the executive or not, as having the force of law. (*Collier & Cleveland Lith. Co. v. Henderson*, 18 Colo. 259, 32 Pac. 417; *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; *May v. Rice, Auditor*, 91 Ind. 546; *Rice, Auditor, v. State ex rel. Drapier*, 95 Ind. 33; *Reynolds, Auditor, v. Blue*, 47 Ala. 711; *State v. Kinney*, 56 Ohio St. 721, 47 N. E. 569; *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N. E. 180; *City of Antonio v. Micklejohn*, 89 Tex. 79, 33 S. W. 735; *Boyers v. Crane, Auditor*, 1 W. Va. 176.) The respondent properly refused to issue the warrants demanded.

2. Since no office was created by the resolution, and the appointment of the relatrix was without authority, the question

touching her eligibility on account of her sex does not arise. It is said in the brief of her counsel that she claims under a general appointment, as well as under the appointment authorized by the resolution. Upon the facts stated, this cannot be so, because her right to the salary is predicated upon the appointment authorized by the resolution. If the state game and fish warden had appointed her generally, without reference to the authority granted by the resolution, then the question of her eligibility would properly have been before us for decision.

The alternative writ must be set aside, and the proceeding dismissed. It is so ordered.

Dismissed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. CASCADE BANK OF GREAT FALLS, RELATOR, v. YODER, SECRETARY OF STATE, RESPONDENT.

(No. 2,727.)

(Submitted June 1, 1909. Decided June 7, 1909.)

[103 Pac. 499.]

Mandamus—State Banks—Extension of Corporate Existence—Statutes Applicable—Capital Stock—Increase.

State Banks—Extension of Corporate Existence—Statutes Applicable.

1. *Held*, on *mandamus* against the secretary of state, that the provisions of sections 3826-3828, Revised Codes, touching the manner in which a corporation may extend its existence, do not apply to state banks, but that section 3907 governs in this respect; and that therefore such a bank was not required to give a notice of six weeks of its intention to extend its corporate existence.

Same—Increase of Capital Stock—Statutes Applicable.

2. A state bank, organized in 1889, properly proceeded, in 1891, under section 526, Chapter 27, Fifth Division Compiled Statutes of 1887 [sec. 3918, Revised Codes], to increase its capital stock, and was under no obligation to give a six weeks' notice of a meeting of its stockholders to consider the question. Section 468, Chapter 25, Fifth Division, Compiled Statutes of 1887 [Sec. 3827, Revised Codes], which required such a notice, had reference to corporations other than state banks.

ORIGINAL application for *mandamus* by the state, on relation of the Cascade Bank of Great Falls, against A. N. Yoder, as Secretary of State, to compel respondent to file a certificate extending the bank's corporate existence. Writ granted.

Mr. Ransom Cooper, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 3, 1889, the Cascade Bank of Great Falls was organized as a state banking corporation with a capital stock of \$40,000; its term of existence being twenty years. On January 24, 1891, the capital stock was increased to \$75,000. On March 18, 1909, the corporation desiring to extend the period of its corporate existence for twenty years from April 3, 1909, the board of directors adopted a resolution calling a meeting of the stockholders for March 29, 1909, to determine whether such extension should be made, and directing the cashier to give notice in writing to every stockholder. Such notice appears to have been given, and at the time and place mentioned in the notice six hundred and fifteen shares, out of the total of seven hundred and fifty shares, were represented. At the stockholders' meeting resolutions were adopted by the unanimous vote of the six hundred and fifteen shares to extend the corporate existence of the corporation for twenty years, from April 3, 1909, to April 3, 1929, and directing the chairman and secretary of the stockholders' meeting and a majority of the directors of the bank to cause to be made and filed the necessary certificates. A certificate setting forth the proceedings had was made by the chairman and secretary of the stockholders' meeting and by a majority of the directors and filed with the county clerk of Cascade county, and a duplicate tendered for filing to the secretary of state. Upon objections raised by the secretary of state, an amended

certificate was prepared by the same parties, filed in the office of the county clerk of Cascade county, and a certified copy thereof tendered to the secretary of state for filing, accompanied by the necessary filing fee. Upon the refusal of the secretary of state to file this amended certificate, this proceeding was instituted. An alternative writ of mandate was issued, and upon the return thereof the secretary of state interposed a general demurrer, and the matter was submitted for determination. It is contended by the attorney general, appearing on behalf of the secretary of state, that the application to this court by the bank discloses that the laws of Montana were not complied with in two particulars: (1) In attempting to extend the corporate existence of the bank; and (2) in attempting to increase the capital stock of the bank.

1. The principal contention arises over the action of the bank in extending its corporate existence. The solution of the difficulty is to be found in a construction of existing statutes. At first blush it would appear that we have conflicting laws upon the subject; but a study of the history of these statutes will dissipate any apparent conflict. Beginning with 1866, an attempt was made to enact an incorporation statute (Act approved December 10, 1866, Laws Third Session, p. 1); but practically all enactments by this session were declared void by an Act of Congress approved March 2, 1867 (14 Stats. 427). At the next session of the territorial legislature an Act was passed and approved on December 13, 1867 (Laws 1867, p. 1), which provides for the incorporation of domestic concerns for certain purposes; the purposes mentioned covering a wide range of subjects. With slight, if any, modifications, this Act was carried into the Codified Statutes of 1871-72, as Chapter 18, and, with some amendments, into the revision of 1879, as Chapter 15; and again into the Compiled Statutes of 1887, as Chapter 25. Sections 467, 468, and 469, of Chapter 25, Fifth Division, Compiled Statutes of 1887, are sections 265, 266, and 267, of Chapter 15, Revised Statutes of 1879, and are sections 22, 23, and 24 of Chapter 18 of the Codified Statutes of 1871-72. In the compilation of

1871-72, Chapter 18 is entitled "Corporations." Chapter 15 of the revision of 1879 is entitled "Corporations for Industrial or Productive Purposes," and the same title is attached to Chapter 25 of the Compiled Statutes of 1887. Whether it was ever intended that a state banking corporation should, or indeed could, be formed under any of the foregoing statutes—which were the only laws upon the subject—we need not stop to inquire; but that for some sufficient reason these statutes were deemed inadequate or inapplicable to a state banking corporation is manifest, for, with those statutes still in full force and effect, the legislature passed an Act entitled "An Act concerning Banks and Banking," which was approved March 5, 1887, and comprises all of Chapter 27 of the Compiled Statutes of 1887. This Act purports to be a complete statute for the incorporation, management, and control of state banks and banking corporations, and differs materially in many respects from the corresponding provisions applicable to other corporations, found in Chapter 25. If the incorporation laws found in Chapter 25 were ever intended to have, or did in fact have, any application to state banks, those laws must be held to have been superseded to that extent by the special statute found in Chapter 27, and from March 5, 1887, when this special statute went into effect, Chapter 25 could not have any application whatever to state banks, except in so far as its provisions are specifically referred to by subdivision 6 of section 2 (now section 515), of Chapter 27.

This was the status of the law when the legislature met in January, 1893. Up to that time there was not any provision of law whatever by which the term of existence of a corporation could be extended beyond that fixed in the original articles of incorporation; but by an Act approved March 2, 1893 (Laws 1893, p. 111), sections 446, 467, 468, and 469, of Chapter 25 of the Compiled Statutes were amended. The amendment of section 446 is immaterial here. Sections 467, 468, and 469 were amended so as to permit a corporation organized under the provisions of Chapter 25 to extend the term of its existence by

giving six weeks' notice of the meeting called for that purpose, etc. Since the provisions of sections 467, 468, and 469, as found in Chapter 25, did not have any application to state banks, at least not after March 5, 1887, of course those sections as amended by the Act of March 2, 1893, did not have any application. The Act of March 2, 1893, is continued in force by section 5186 of the Political Code of 1895, and by section 5184 the provisions of that Act are held to be amendments to the Code provisions on the same subject inconsistent therewith. In the Civil Code of 1895, section 562 is an original Code provision, which prescribes the manner in which a corporation may extend the term of its existence; and section 563, also an original Code provision, provides: "The provisions of this title are applicable to every corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this title, in which case the special provision prevails." If the provisions of section 562 are inconsistent with the Act of March 2, 1893, then those provisions will be held to have been amended. But is there in fact any inconsistency? As said above, the Act of March 2, 1893, did not have any application to state banks, and probably there were other corporations not included in Chapter 25 of the Compiled Statutes which likewise were not affected by the Act of March 2, 1893. So there is not any reason apparent why both section 562 above, and the Act of 1893 were not in full force and effect; the former applying to state banks and other corporations not included in the provisions of Chapter 25 of the Compiled Statutes, and the latter applying to all corporations comprised within the provisions of Chapter 25. In the Codes of 1895 the provisions of Chapter 25, Compiled Statutes, are largely superseded by the general incorporation laws found in Part IV, Civil Code; but, with some changes not material here. Chapter 27 of the Compiled Statutes is found in Title II, sections 570-578, Civil Code, and with some additional amendments, not applicable to the question now before us, these provisions of the Code, and the Act of March 2, 1893, are to be found in the

Revised Codes of 1907. The Act of March 2, 1893, is found in sections 3826-3828, and sections 562 and 563, Civil Code of 1895, are found in sections 3907 and 3908.

When the officers of the Cascade Bank sought to extend the term of its existence they proceeded under section 3907, Revised Codes. It is said that their action was ineffectual, because they did not give the six weeks' notice of their meeting, as required by the Act of March 2, 1893, now sections 3826-3828, Revised Codes. Holding, as we do, that the Act of 1893 did not apply to state banks, and that the provisions of sections 3826-3828, Revised Codes, do not, but that section 562 of the Civil Code of 1895, now section 3907 of the Revised Codes, governs in a case of this character, the objection of the respondent, based upon this contention, is not well founded.

2. Assuming, for the purposes of this proceeding only, that the failure of a bank to comply with the law in increasing its capital stock would be a valid reason for the secretary of state refusing to file the certificate extending the term of that bank's existence, we are brought to a consideration of the second question raised here, viz.: Did the Cascade Bank pursue the statute in increasing its capital stock in 1891? At that time the only provisions in force were Chapters 25 and 27 of the Compiled Statutes. Sections 468 and 469 of Chapter 25 require that six weeks' notice of a meeting of the stockholders shall be given before the question of increasing the capital stock can be considered, and that a certificate of the proceedings showing a compliance with the provisions of the chapter shall be executed and filed with the county clerk of the county where the original articles of incorporation are filed, and a duplicate thereof filed with the secretary of state, while section 526 of Chapter 27 provides: "It shall be lawful for any corporation organized under the provisions of this Act, by their by-laws to provide for an increase of their capital stock. * * * " It is alleged in the petition, and admitted by the demurrer, that the bank fully complied with the terms of section 526; and, as said above in paragraph 1 of this opinion, we think the provisions of Chapter

27, so far as a state bank was concerned, were controlling, and that a compliance with sections 468 and 469 was not necessary. If the legislature had intended that sections 468 and 469 should be observed by a state banking corporation, appropriate reference would have been made to those sections; but this was not done. It is now suggested, however, that since section 526 of Chapter 27, above, is still in force as section 3918, Revised Codes, it is possible, under this view, for a state bank to increase its capital stock without paying to the secretary of state the fees required from other corporations under subdivision 4 of section 165 of the Revised Codes. If such result follows, it is only because of a lapse in legislation, and many such can be found.

Since it appears from the application that the Cascade Bank complied with the statutes in force, in increasing its capital stock and in extending the term of its corporate existence, there does not appear any reason why the amended certificate should not be filed.

It is ordered that a peremptory writ of mandate issue, directing the secretary of state to file the amended certificate extending the term of the corporate existence of the Cascade Bank of Great Falls, upon the bank paying the fees therefor required by law.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

**SANDEN, APPELLANT, v. NORTHERN PACIFIC RAILWAY
CO., RESPONDENT.**

(No. 2,667.)

(Submitted June 8, 1909. Decided June 10, 1909.)

[102 Pac. 145.]

New Trial Order—Statutes—Constitutionality—Determination.

Statutes—Constitutionality—Determination.

1. Unless the necessity of passing upon the constitutionality of a statute is urgent and imperative, the supreme court will not do so on appeal.

New Trial Order—On Minutes.

2. Where a notice of intention to move for a new trial recited that the motion would be made on the minutes of the court and a bill of exceptions, and the order of the court simply stated that if was granted, it was not sufficient for appellant to show that the court was not warranted in granting the motion on the bill of exceptions, (which was absent from the record) but he had the burden of showing also that it was not authorized to do so upon the minutes.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Frank Sanden against the Northern Pacific Railway Company. From an order granting defendant's motion for a new trial on the minutes, plaintiff appeals. Affirmed.

Mr. Jas. M. Hinkle, and Mr. Chas. A. Wallace, for Appellant.

Mr. Wm. Wallace, Jr., Mr. Jno. G. Brown, and Mr. R. F. Gaines, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The plaintiff appeals from an order of the district court of Silver Bow county granting the defendant a new trial. The defendant's bill of exceptions on this motion for a new trial is not in the record, and although the plaintiff, at the time the order granting the new trial was made, was given thirty days in which to prepare and serve a bill of exceptions, it does not appear that advantage was ever taken of the leave granted; so

39	209
p39	212
d39	400
39	522
39	209
d40	611

that there is in this record no bill of exceptions of any kind. There is, however, in the record a copy of what purports to be defendant's notice of intention to move for a new trial, which recites that "the application will be made and based upon the minutes of the court herein, and a bill of exceptions hereafter to be prepared." What is called a "statement on appeal" recites that the verdict of the jury was returned on April 27, 1908, judgment was entered on April 30, 1908; on May 4, 1908, the district court entered an order allowing the defendant sixty days, in addition to the time allowed by law, within which to "prepare, serve, and obtain a settlement of" its bill of exceptions. On July 7, 1908, defendant served its bill of exceptions, whereupon plaintiff served and filed objections to the settlement on the ground that the court had lost jurisdiction to settle the same. The court settled the bill, caused plaintiff's objections to the settlement to be incorporated therein, and thereafter entered an order granting a new trial, from which order this appeal, as aforesaid, is prosecuted. As heretofore stated, there is before us no bill of exceptions showing any of these matters.

The grounds of plaintiff's objections to the settlement of the bill of exceptions, and of his contention in this court, are thus stated in the brief of his counsel: "The only question presented to this court on appeal is whether the lower court had the right, or jurisdiction, at the time, to grant defendant (respondent) a new trial, and that question depends on whether Senate Bill No. 24, attempted to be passed by the eighth session of the legislature of the state of Montana, in 1903, wherein it was attempted to give the court power to extend the time ninety days, instead of thirty days, as provided by section 1897 of the Code of Civil Procedure, within which a party may serve and file a bill of exceptions and statement on motion for a new trial (Session Laws 1903, p. 37)," was passed in accordance with constitutional requirements. "Appellant's contention is that said Senate Bill is not a valid law, because of a failure of the said legislature to comply with the mandatory requirements of the Constitution of the state of Montana in passing it." Section 1897, Code of Civil

Procedure, is now section 7190, Revised Codes. But it is not permitted us to examine this constitutional question. Courts are always loath to pass upon the constitutionality of an Act of the legislature, unless the necessity therefore is urgent and imperative.

The district court has general jurisdiction to grant new trials, and the action of that court is presumed to be regular. The order granting a new trial is general in terms, simply reciting: "This day the motion of the defendant for a new trial is granted." Under the law relating to motions for new trials in force at the date of the proceedings, such motion could be made and granted on the minutes of the court. (Revised Codes, sec. 6795.) As the notice of intention to move for a new trial recited that the motion would be made on the minutes of the court, and there is nothing to indicate that the order was not based upon the minutes, we cannot say that the court acted entirely upon the bill of exceptions. It may be that the bill was not considered by the district court, but that the order was based entirely on what was disclosed by the minutes. When an application for a new trial is made on the minutes of the court, in the absence of a bill of exceptions, the trial court is presumed to have considered all of the pleadings, records, minute entries, and the evidence offered at the trial, and to have determined the motion on the case thus presented. (*State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139.)

As the burden is on the appellant to show that the district court was not warranted in granting the motion for a new trial, either on the bill of exceptions or the minutes of the court, and he has not done so, the order must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

**SANDEN, APPELLANT, v. NORTHERN PACIFIC RAILWAY
CO., RESPONDENT.**

(No. 2,668.)

(Submitted June 8, 1909. Decided June 10, 1909.)

[102 Pac. 146.]

[For syllabus, see *Sanden v. Northern Pacific Railway Co.*, ante,
p. 209.]

ACTION by Mina Sanden against the Northern Pacific Railway Company. From an order granting defendant's motion for a new trial on the minutes, plaintiff appeals. Affirmed.

Mr. Jas. M. Hinkle, and *Mr. Chas. A. Wallace*, for Appellant.

Mr. Wm. Wallace, Jr., *Mr. Jno. G. Brown*, and *Mr. E. F. Gaines*, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The record in this case discloses the same condition as that existing in the case of *Frank Sanden, Appellant, v. Northern Pacific Railway Company, Respondent* (ante, p. 209), 102 Pac. 145; and on authority of that case the order of the court below, granting the defendant a new trial, is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

**YERGY, RESPONDENT, v. HELENA LIGHT & RAILWAY CO.,
ET AL., APPELLANTS.**

(No. 2,647.)

(Submitted June 8, 1909. Decided June 10, 1909.)

[102 Pac. 310.]

39	213
39	560
41	213
41	240
41	506
39	213
40	209

Street Railways—Personal Injuries—Expert Witnesses—Competency—Discretion—Nonsuit—Willful Conduct of Defendant—Instructions—Objections—Exceptions—Review—Earning Capacity—Opinion Evidence—Excessive Damages.

Expert Witnesses—Competency—Discretion.

1. It was within the discretion of the trial judge to say whether a witness called as an expert was competent.

Street Railways—Personal Injuries—Willful Conduct of Defendant—Nonsuit.

2. Where the burden of the complaint against a street railway company was that the death of plaintiff's testator, for which damages were sought, was due to the negligence of defendant's employees in managing one of its cars, failure on plaintiff's part to introduce evidence in support of an additional allegation that defendants' conduct was willful did not warrant the granting of a nonsuit.

Nonsuit—Denial—When Error Cured.

3. Where defendant, after an adverse ruling on a motion for nonsuit made at the close of plaintiff's case, introduced evidence which cured the defects upon which the motion was based, the error in denying the motion will be deemed to have been waived.

Street Railways—Personal Injuries—Evidence—Last Clear Chance.

4. Evidence held to have been sufficient to furnish basis for the application of the doctrine of last clear chance.

Theory of Case—Instructions.

5. Where a cause is tried upon a certain theory, the losing party cannot on appeal complain of an instruction covering such theory.

Street Railways—Personal Injuries—Instructions—Proper Refusal.

6. An action against a street railway company having been tried upon the theory that negligence in the management of its car could properly be predicated upon the failure of its motorman to exercise reasonable care after deceased was discovered in a situation of peril, a requested instruction which would have authorized the jury to find for defendant, regardless of the conduct of the motorman after he discovered deceased in a place of danger, was properly refused.

Same—Willful Conduct of Defendant—Instructions—Proper Refusal.

7. A requested instruction that plaintiff could not recover, even though defendant company was negligent in running its car and deceased was in no respect negligent, unless its conduct in managing the car was willful and reckless, was properly refused where the allegation of willfulness and recklessness in the complaint was not of the *gravamen* of the pleading, where no evidence had been introduced in support of it, and where there was evidence sufficient to warrant recovery aside from the question of willfulness and recklessness.

Instructions—Objections—Exceptions—Review.

8. Under section 6746, Revised Codes, the supreme court may not consider an assignment of error based upon the giving or refusal of an instruction unless proper objection to the instruction proposed to be given, was made and exceptions saved to the rulings of the trial court.

Street Railways—Personal Injuries—Earning Capacity—Opinion Evidence.

9. A witness who testified that he had known deceased for twenty years and had himself for thirty-five years conducted a similar business to that carried on by the latter, that he had done a great deal of business with deceased, and that the latter's capacity as a business man was first class, that he was a good mechanic, kept his own books, etc., and that in his judgment his earning capacity prior to his death was \$5,000 a year, was qualified to express an opinion as to the value of deceased's services to his business.

Same—Excessive Damages—Jury—Passion and Prejudice.

10. In awarding damages claimed to be excessive, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors, if the verdict is based on competent testimony, in accordance with instructions of the court, and easily to be arrived at by mathematical calculation.

Same—Excessive Damages—Remission—New Trial.

11. Where the damages awarded are clearly excessive, the supreme as well as the district court has the power to require the plaintiff either to remit a portion of the verdict or submit to a new trial.

Same—Excessive Damages—Reduction.

12. *Held*, that the verdict for \$40,000 was excessive, and a new trial ordered unless plaintiff consent to a reduction of the judgment to \$15,000.

Appeal from District Court, Lewis and Clark County; Thos. C. Bach, Judge.

ACTION by Mary Alice Yergy, executrix of George O. Yergy, deceased, against the Helena Light and Railway Company and Stephen Peterson. Judgment for plaintiff, and defendants appeal. The judgment affirmed on condition that plaintiff remit a portion of the damages awarded, otherwise reversed and new trial granted.

Messrs. Carpenter, Day & Carpenter, and Mr. Wm. Wallace, Jr., for Appellants.

Negligence is a relative term and consists in a failure to do something which, under the circumstances of the particular case, it became the duty of the person charged to do. The duty of the operatives of a street railway at a crossing is no greater than the duty of persons intending to cross the tracks, taking into con-

sideration the relative situation of the parties, and the fact that pedestrians and persons driving a vehicle in full possession of their faculties and control of their teams have more freedom of movement than those in control of the car. As each have an equal right to use the street crossing, and cannot exercise the common right to use the crossing at the same moment of time without serious injury to one or both, equal obligation to care rests upon both. Control of a car means a reasonable control under the circumstances, and not an absolute control so that the car may be immediately stopped under all circumstances. (*Skinner v. Tacoma etc. Ry. Co.*, 46 Wash. 122, 89 Pac. 489.) The evidence as to what was done to stop the car must be measured by the opportunity to do it, under the circumstances there present. Where the alleged negligence of a servant consists of an omission of duty suddenly and unexpectedly arising, it is incumbent on the plaintiff to show that the circumstances were such that the servant of the defendant had an opportunity to become conscious of the facts giving rise to the duty and a reasonable opportunity to perform it, before the master can be held liable. (*Chicago Union Trac. Co. v. Browdy*, 206 Ill. 615, 69 N. E. 570; *Hestonville M. & F. Pass. Ry. Co. v. Kelley*, 102 Pa. 115; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. 967; *Rack v. Chicago City Ry. Co.*, 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127; *Chicago City Ry. Co. v. Strong*, 127 Ill. App. 472; *Citizens' Street Ry. Co. v. Carey*, 56 Ind. 396; *Louisville & N. R. Co. v. Young*, 153 Ala. 232, 45 South. 239.)

Upon the presentation of the motion for nonsuit it was suggested that the presumption, based upon the instinct of self-preservation, that the deceased was in the exercise of due care, was sufficient to justify the refusal of this motion. However correct this ruling may have been then, the presumption has now been completely overthrown by the positive testimony of witnesses that the deceased did nothing to avoid the injury. (*Rich v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 79, 78 C. C. A. 663; *Woolf v. Washington R. & N. Co.*, 37 Wash. 491, 79 Pac. 997.)

Under the pleadings in this case, the plaintiff was required to prove that the injury to the deceased was willful and intentional, and proof of facts from which only negligence, however gross, could be inferred was not sufficient. (2 Abbott's Brief on Pleadings, 1680; *Rideout v. Winnebago Trac. Co.*, 123 Wis. 297, 101 N. W. 672, 3 St. Ry. Rep. 943, 69 L. R. A. 601 and note, and especially the conclusions, p. 615; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Markowitz v. Metropolitan St. Ry. Co.*, 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.)

The doctrine of the "last clear chance" or humanitarian doctrine, as it is sometimes termed, is not a doctrine by itself, but is an element in all cases where contributory negligence is pleaded, as determining whether or not the contributory negligence of the injured party was a proximate or concurring cause of the injury. (See *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.)

The doctrine has been frequently before the courts in recent years. The whole literature upon the subject is summarized in the notes to be found in 55 L. R. A. 418 *et seq.*, attached to the cases of *Bogan v. Carolina Central R. Co.*, 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418, and *Gahagan v. Boston & M. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

The case of *Dyerson v. Union P. R. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A., n. s., 132, is strongly illustrative of the case at bar. In that case the court holds that where the injured person could have avoided the accident by the exercise of ordinary care on his part, and where his negligence continued up to the very moment that he was hurt, and where reasonable diligence on his part prior to that time would have warned him in time to have avoided the injury, his negligence in failing to observe the threatened danger concurs with the defendant's negligence in failing to observe him in time to have prevented injuring him, the doctrine of "last clear chance" did not apply, and there can be no recovery.

In *Drown v. Northern Ohio Trac. Co.*, 76 Ohio St. 234, 118 Am. St. Rep. 844, 81 N. E. 326, 10 L. R. A., n. s., 421, the court held it reversible error to give an instruction identical in terms with our No. 19 requested. (See, also, *Richmond Pass. & Power Co. v. Gordon*, 102 Va. 498, 46 S. E. 772; *Vizacchero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188; *Brockschmidt v. St. Louis & M. R. Co.*, 205 Mo. 435, 103 S. W. 964, 12 L. R. A., n. s., 345; *Anderson v. Minneapolis etc. R. Co.*, 103 Minn. 224, 114 N. W. 1123, 14 L. R. A., n. s., 886, note; *Holwerson v. St. Louis & S. R. Co.*, *supra*; *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 61 S. E. 821.)

A pedestrian, seeing the approach of a car at a negligent rate of speed, cannot take possession of the crossing and expose himself to obvious danger, under the claim of his equal right to the use thereof, and his assumption of a plainly apparent risk in attempting to get across ahead of a car will bar recovery. (*Sego v. Southern Pac. Co.*, 137 Cal. 405, 70 Pac. 279; *Everett v. Los Angeles Ry. Co.*, 115 Cal. 128, 43 Pac. 210, 46 Pac. 889, 34 L. R. A. 350; *Matteson v. Southern Pac. Co.*, 6 Cal. App. 318, 92 Pac. 101.)

The motorman has the right to assume that Yergy would await the passage of the car, until it became apparent that he did not intend to do so. (*Florida etc. Ry. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *Elliott v. Chicago etc. Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Collins v. Burlington etc. Ry. Co.*, 83 Iowa, 346, 49 N. W. 848; *Green v. Los Angeles etc. Ry. Co.*, 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 719; *Beach on Contributory Negligence*, 394; 2 *Shearman & Redfield on Negligence*, p. 852.)

Upon the question as to whether the car could have been stopped in a shorter distance than it was, a nonexpert is incompetent to express an opinion. (*Boring v. Metropolitan R. Co.*, 194 Mo. 541, 92 S. W. 655; *Columbus R. Co. v. Connor*, 6 Ohio C. C., n. s., 361.)

Where the profits of the injured one's business do not depend upon his personal skill and services, but arise from the invest-

ment of capital and involve the labor of others, evidence of such profits is not admissible. (*Johnson v. Manhattan R. Co.*, 52 Hun, 111, 4 N. Y. Supp. 848; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *McCracken v. Traction Co.*, 201 Pa. 384, 50 Atl. 832; *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 45 Atl. 685, 52 L. R. A. 33, and note; *Blate v. Third Ave. R. Co.*, 51 N. Y. Supp. 590; *Bierbach v. Goodyear R. Co.*, 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1007; *Goodhart v. Pennsylvania Ry. Co.*, 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191; 7 Ency. of Ev. 421.)

Messrs. H. G. & S. H. McIntire, and Mr. Massena Bullard, for Respondent.

Street railroads are liable for the negligence of its employees in failing to have the car under control at street crossings, thereby causing injury to persons with vehicles, and the question of negligence and contributory negligence is for the jury. (*Hicks v. Citizens' R. Co.*, 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508, note.)

Excessive speed and want of sufficient control of the car by the motorman are shown where the car runs a considerable distance after the happening of the accident, notwithstanding the efforts to stop it. (Thompson on Negligence, Supplement, sec. 1395.) Indirectly, the rate of speed may be shown by evidence as to the space covered after an attempt has been made to stop the car, where evidence is admitted showing how soon cars running at different rates of speed could be stopped. (*Id.*, sec. 1411; see, also, *Cross v. California St. Cable Co.*, 102 Cal. 313, 36 Pac. 673; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A., n. s., 1059; 6 Current Law, p. 1570, and note 87; *Wall v. Helena St. Ry. Co.*, 12 Mont. 44, 29 Pac. 721.)

That the motorman is negligent when he fails to exercise reasonable care to discover the presence of persons negligently exposing themselves on the track, see *Harrington v. Los Angeles*

R. Co., 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15, 63 L. R. A. 238; *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169; 1034; *Carney v. Concord St. R. Co.*, 72 N. H. 364, 57 Atl. 218; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162.

The deceased was not guilty of contributory negligence prior to or at the time of the collision of the car with his buggy. The rule to "stop, look and listen" is not applicable to street railroads. (*Wall v. Helena St. R. Co.*, 12 Mont. 44, 29 Pac. 721; *Tacoma etc. Power Co. v. Hayes*, 110 Fed. 496, 49 C. C. A. 115; *Hays v. Tacoma Power Co.*, 106 Fed. 48; *Cincinnati Street Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183; *Orr v. Cedar Rapids etc. Ry. Co.*, 94 Iowa, 423, 62 N. W. 851; *Wolf v. City Ry. Co.*, 50 Or. 64, 85 Pac. 620, 91 Pac. 464, 465; 2 Thompson on Negligence, secs. 1441, 1443, 1448, 1452, 1479; *Cross v. California S. R. Co.*, 102 Cal. 313, 6 Pac. 673; see, also, *Goff v. St. Louis Transit Co.*, 199 Mo. 694, 98 S. W. 49, 9 L. R. A., n. s., 244; *Baker v. Wilmington etc. Co.*, 118 N. C. 1015, 24 S. E. 415; *Eckhard v. St. Louis T. Co.*, 190 Mo. 593, 89 S. W. 602; *Littlefield v. New York City Ry. Co.*, 51 Misc. Rep. 737, 101 N. Y. Supp. 75.)

It is further claimed that because of the use of the words "willfully and recklessly" in the complaint, a nonsuit should have been granted. The rule is general that in a complaint charging willfulness, wantonness, gross negligence, etc., a recovery can be had for proof of simple negligence. (*Chicago City Ry. Co. v. O'Donnell*, 207 Ill. 478, 69 N. E. 882; *Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491; *Rockford Co. v. Phillips*, 66 Ill. 548; *Keating v. Detroit etc. R. Co.*, 104 Mich. 418, 62 N. W. 575; *Claxton v. Lexington etc. R. Co.*, 13 Bush, 636; *Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 983; *Cleveland etc. R. Co. v. Asbury*, 120 Ind. 289, 22 N. E. 141;

Kramm v. Stockton El. R. Co., 3 Cal. App. 606, 86 Pac. 738, 904.) With complaints containing similar allegations,—*Wall v. Helena St. Ry. Co.*, 12 Mont. 44, 29 Pac. 721, and *Bourke v. Butte Electric etc. Co.*, 33 Mont. 267, 83 Pac. 471,—were determined as though the actions were for negligence.

To constitute contributory negligence a defense, it must be shown that such contributory negligence was the proximate cause of the accident. In this case the death of Yergy was not the result of the impact or collision of the car with the vehicle in which he was sitting, but was the result of the wheel of the car running over him at a point 87.8 feet from the place of such collision, and this was the result and consequence of defendant's failure to stop the car. While he was on the ground, helpless, it is absurd to suppose that any act of his contributed to such running over.

The following cases establish what is sometimes called "the last clear chance" or the "humane" doctrine, as the exception to the general rule of contributory negligence. (*Wall v. Helena St. Ry. Co.*, 12 Mont. 44, 29 Pac. 721; *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 97 Pac. 945; *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 666, 72 N. E. 478; *Cleveland C. C. & Co. v. Klee*, 154 Ind. 430, 56 N. E. 236; *Citizens' St. Ry. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 660, 63 N. E. 778; *Philadelphia etc. R. Co. v. Kutt*, 148 Fed. 820; *Weitzman v. Nassau El. R. Co.*, 53 N. Y. Supp. 905, 33 App. Div. 585; *Mayes v. Metropolitan S. R. Co.*, 121 Mo. App. 614, 97 S. W. 612; *Cole v. Metropolitan S. R. Co.*, 121 Mo. App. 605, 97 S. W. 555; *Goff v. St. Louis Transit Co.*, 199 Mo. 694, 98 S. W. 49, 9 L. R. A., n. s., 244; *Baker v. Wilmington etc. Ry. Co.*, 118 N. C. 1015, 24 S. E. 415; *Green v. Metropolitan S. Ry. Co.*, 171 N. Y. 201, 80 Am. St. Rep. 807, 63 N. E. 958; *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15, 63 L. R. A. 240, 242; *Richmond Passenger etc. Co. v. Gordon*, 102 Va. 498, 46 S. E. 772; *Louisville etc. Ry. Co. v. Edelen*, 123 Ky. 629, 96 S. W. 902; *Thompson v. Salt Lake etc. Co.*, 16 Utah,

281, 67 Am. St. Rep. 621, 52 Pac. 92, 40 L. R. A. 172; *Scott v. San Bernardino V. T. Co.*, 152 Cal. 604, 93 Pac. 680; *Teakle v. San Pedro etc. R. Co.*, 32 Utah, 276, 90 Pac. 405, 408, 409, 10 L. R. A., n. s., 486; *Spiking v. Consolidated Ry. & P. Co.*, 33 Utah, 313, 93 Pac. 838; 1 Thompson on Negligence, secs. 232, 236; 2 Thompson on Negligence, secs. 1475-1477; Thompson on Negligence, Supplement, secs. 239, 240.)

The evidence shows a wanton, willful disregard of the safety of travelers by the motorman of the car in question at the time of the injury. Where this element enters into the conduct of the defendant, or its employees, at the time and place of the accident, the prior want of ordinary care on the part of the deceased is no defense. (*Neary v. Northern Pacific R. Co.*, 37 Mont. 461, 97 Pac. 948, 949; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 421, 44 N. E. 311, 37 L. R. A. 378; *Montgomery v. Lansing C. E. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 289; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15, 63 L. R. A. 240, 242; *Kramm v. Stockton Electric R. Co.*, 36 Cal. App. 606, 86 Pac. 738, 904.)

When the evidence is undisputed, or when there is no evidence, the question of proximate cause of an injury, and its corollary contributory negligence of the deceased, become a matter of law for the court and should not be submitted to the jury. (*Cole v. German S. & L. Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 423; *Snyder v. Colorado etc. R. Co.*, 36 Colo. 288, 118 Am. St. Rep. 110, 85 Pac. 686, 8 L. R. A., n. s., 781; *Missouri Pac. Ry. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *McGhee v. Norfolk etc. Ry. Co.*, 147 N. C. 142, 60 S. E. 917.)

In such cases as this, the age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings, his general health and intelligence, his habits and capacity, mental and physical, to earn and acquire property, what he had saved and what he would have accumulated had he lived, are all to be considered. (*Louisville etc. R. Co. v. Clarke*, 152 U. S. 242, 14 Sup. Ct. 579, 38 L. Ed. 425; *Skottawe v. Ore-*

gon etc. R. Co., 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593-600; *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 639, note; *Illinois C. R. Co. v. Davidson*, 76 Fed. 521, 522, 22 C. C. A. 306, and cases there cited; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 519, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71; *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1074; *Silsby v. Michigan Car Co.*, 95 Mich. 209, 54 N. W. 761; *Masterton v. Vernon*, 58 N. Y. 396.) Nonexperts who are shown to be familiar with the extent and character of the particular service may properly give their opinion of the value of that service. (*Forbes v. Howard*, 4 R. I. 364; *Mercer v. Vose*, 67 N. Y. 57; *Edwards v. Fargo & S. Ry. Co.*, 4 Dak. 549, 33 N. W. 100; *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.)

The character and extent of the business of a person injured to which he devoted his personal attention, and the profits therefrom, may be given in evidence in a personal injury action, as tending to establish the extent of his loss of earnings or earning power. (*Chicago, R. I. & Pac. Ry. Co. v. Scheinkoenig*, 62 Kan. 57, 61 Pac. 415; *Chicago etc. Ry. Co. v. Posten*, 59 Kan. 449, 53 Pac. 466; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.)

MR. JUSTICE SMITH delivered the opinion of the court.

These are appeals from a judgment entered on the verdict of a jury, and from an order denying a new trial, in a case in which Mary Alice Yergy, as executrix, the plaintiff, was awarded damages in the sum of \$40,000 on account of the alleged negligence of the defendants, the Helena Light and Railway Company and Stephen Peterson, its motorman, resulting in the death of plaintiff's husband, George O. Yergy, a lumber dealer in the city of Helena. The death occurred on December 1, 1906, and resulted from a collision between one of the defendant company's street railway cars propelled by electricity, which was being operated by Peterson, and a buggy drawn by a single horse, in which buggy the deceased, Yergy, was attempting to cross the railway tracks at the intersection of Lyndale and Benton avenues. The com-

plaint alleges that Peterson "did not keep any lookout for persons or vehicles who were then approaching or crossing the tracks; nor did he have said car under sufficient, or any, control, so as to avoid injuring travelers passing over the railway tracks; nor did the defendant stop said car in time to avoid injuring Yergy, but, on the contrary, the said street-car was then and there by the defendants run at a high, negligent and dangerous rate of speed, and far in excess of that allowed by law, whereby the said car was propelled and driven with great violence at and against the vehicle in which Yergy then and there was, and the said vehicle was upset and thrown over, and the said Yergy was thrown thereout and cast upon the ground, after which, and by reason of the careless and negligent management and operation of said car, said Yergy was drawn and dragged by the same over and along the ground, and over and along the railway tracks, for a great distance, and was drawn and dragged under the wheels of said car, and the same were then and there run and driven over him, whereby he was then and there crushed and killed." Then follows an allegation that the defendants, in so running the car and causing the death of Yergy, "acted in a willfully and recklessly negligent manner, and without any regard to their duty in the premises, and without any regard to the safety, rights, and life of said Yergy." The complaint also contains the allegation that "deceased left no children or other heirs dependent upon him, save and except the plaintiff." The defendants denied negligence on their part, and alleged (1) that the proximate cause of the death of Yergy was his own negligence; and (2) that he was guilty of contributory negligence.

The first complaint made by the appellants is this: That the court erred in allowing plaintiff's witness, Samuel M. Ross, to testify as to the distances within which a street-car could be stopped, under certain circumstances, when going at different rates of speed. The witness had testified that he was inspector of railways for the State Railway Commission, and had had eight years' experience in the railroad business; that he had acted as

a street-car conductor for about three months, but had never been a motorman; that he had taken a motorman's place several times, and had stopped electric cars; that he had observed the speed of cars and the stopping of cars, and had some knowledge of the space in which cars running by electricity could be stopped. He said he had never stopped a car in an emergency, and had never seen the car which caused the accident, but that "he was in a position to tell the court in what space a car could be stopped" under the circumstances narrated in the question propounded to him. We think there was no prejudicial error in the ruling complained of. The competency of the witness was a matter for the court to decide, and one in which its discretion could properly be exercised. We find no abuse of discretion, and in addition, other witnesses for the plaintiff testified to the same general import, and the testimony of Ross in effect was cumulative.

In order to properly illustrate the other propositions of law involved, it seems necessary to set forth a portion of the testimony. John Edgerton, a witness for the plaintiff, testified that he was in a cab on Lyndale avenue, which is a street of average travel, on the evening in question; that at some distance east of the intersection of Lyndale and Benton avenues the cab passed a buggy, in which the deceased Yergy was riding. The cab was going at the rate of from six to seven miles an hour. As the cab passed the buggy, the horse attached to the buggy began to trot. There was an arc light at the intersection of the two avenues, and the street-car could be seen approaching for many hundred feet south of the intersection of the two streets. The cab had reached a point approximately one hundred feet west of the railroad track, when the witness looked out to see if the approaching car would stop at Lyndale avenue. At that time the car was running at the rate of about twenty-two miles an hour. Witness first saw the car approaching when it was at a point about four hundred feet south of the intersection of the two streets. He heard the gong of the street-car sounding. When the car was at a point from fifty to one hundred feet

south of the intersection of the railroad track and the roadway of Lyndale avenue, there was a succession of strokes on the gong. Witness and the driver of the cab, learning that a collision had taken place, returned to the point on Benton avenue where the car was stopped. Mr. Yergy at that time was lying across the track, with his head on the rail between the two west wheels of the forward truck of the car. He appeared to be dead. The car stopped at a point about eighty-seven feet north of the intersection of the two avenues. The car was illuminated, and was easily visible. There was introduced in evidence an ordinance of the city of Helena, prescribing that the rate of speed for street-cars at the point in question should not exceed twelve miles per hour.

Nathan Godfrey, an insurance agent, testified that his company would charge for an annuity of \$5,000 per annum, for a man forty-nine years of age, for the balance of his life, the sum of \$71,800.

Ben. Hay, the cab driver, testified that, when the car stopped, the front wheel of the forward truck was off the track; that Mr. Yergy did not look around when the cab passed his buggy, and paid no attention at all to the cab as it passed.

Amos Shelladay, a witness for the plaintiff, testified that he was a former employee of the defendant company; that he knew the car in question; that for a couple of hundred feet south of the intersection of Lyndale and Benton avenues the street car track was practically level; that under the conditions existing on the night in question the car could have been stopped in the space of twenty feet, going at the rate of eight miles an hour; that at the rate of twelve miles an hour it ought to be stopped in practically the same distance, and, going at the rate of eighteen or twenty miles an hour, the car could be stopped in fifty feet. J. W. Ludwick substantially corroborated Shelladay.

J. B. Sanford testified that he had known deceased for twenty years; that he was in the planing-mill and lumber-yard business, and witness at one time conducted a similar business for a period of thirty-five years; that he had a great deal of business

with Mr. Yergy, and "could tell his capacity as a business man was first-class, particularly as to the kind of business he was conducting. In my judgment his earning capacity prior to his death was worth \$5,000 a year. He was a very good mechanic, and understood the running of a planing-mill and keeping machinery in order. He was his own bookkeeper, and thoroughly acquainted with lumber, and the buying and selling of it, and he was a working man besides. It is pretty hard to find a man with all the qualifications that he had. Very seldom will you find a man that could do it, and that is the reason I say his time would be worth that for a man doing that kind of business."

Thomas E. Goodwin, an expert accountant, testified that he had examined the books of Mr. Yergy, and that these books disclosed the fact that for several years prior to his death the profits of Mr. Yergy's business averaged about \$8,700 per annum. This testimony was not objected to at the time it was given. At the close of plaintiff's case the defendants interposed a motion for a nonsuit, for two reasons: (1) That no evidence had been introduced to support the allegations of the complaint that the acts of the defendants were willful; and (2) that "the evidence shows only the happening of the accident and its results, and does not show the circumstances immediately accompanying it, so that the only inference which can be drawn from the facts testified to is that the deceased got upon the track of the defendant company, in full view of the rapidly moving car, which said car was lighted, so that it could be readily seen, and with the gong ringing so that it could be readily heard; and the evidence fails to show that the deceased was at that time in the exercise of ordinary care, and also fails to show that the accident was proximately caused by the negligence of the defendant." This motion was denied, whereupon the defendant moved to strike from the record the testimony of Mr. Goodwin as to the showing made by the books of the Yergy estate, "for the reason that the same is incompetent and immaterial, and that earnings of business are speculative in character, and do not form the proper measure of damages." The court overruled the motion, and the defendants saved an exception.

On the part of the defendants testimony was then introduced which tended to show that the car could not be stopped within the distances testified to by plaintiff's witnesses. Stephen Peterson testified: "I am the motorman who is one of the defendants in this case. I got no signal to stop for Lyndale avenue, and I kept going right along on down to about forty feet away from Lyndale avenue. A horse stepped in on the crosswalk, and as soon as I saw the horse stepping on the crosswalk, I set on the brake, and saw that he wasn't stopping, and I reversed the car as fast as I could, and he never paid any attention to me until I got—the horse didn't pay any attention. Before he got on the track, kind of stopped. The man never paid any attention to me at all, and the horse got on the track and got scared of the headlight, and he made a jump, and when he made that jump he stopped again and I got the man. I first saw the horse coming in on the street when I was about forty feet away from Lyndale avenue. I was ringing the gong loud; I sounded it four or five times. When I first saw the horse, he just stepped on to the cross-walk that runs across Lyndale avenue. I rang the bell at that time—the horse made a jump, and the buggy was just in the middle of the track. The man, when I first saw him, was sitting with his head down at that time. I think he was about thirty feet away from me. He was going just about five miles an hour. The horse was trotting along. I was going about eight miles an hour. I reversed the car and set the brakes, and tried to stop the car. The car responded readily to my movement. I had not struck the buggy when I got the power reversed. I was then about ten feet from Lyndale avenue. I had not seen the man at any time before the horse stepped on the crosswalk. I kept looking along the street ahead." On cross-examination he said: "I had no power at all. I was just going down the grade with the momentum of the car. I was looking right in the street out of the corners of my eyes. My gaze was directed on the street ahead. I did not look east on Lyndale avenue—east of Benton avenue—to see if anybody was coming. I did not look

that way, because if I look that way somebody might be coming from the other side. There was nothing to stop me from looking on Lyndale avenue east of Benton avenue. I would not be enabled to see anything at the point in question, except what was under the light. The only efforts that I made to keep the car under control before coming to Lyndale avenue, and before I saw the horse and buggy, was to take up a little slack out of the brake. That is all that was necessary. I had my hand on the brake. When I first saw Mr. Yergy, he had his head down, and was not paying any attention. I saw then that he was in a point of danger, and did not pay any attention to things. As soon as I saw that, I began to tighten up my brakes. I had to make three turns to tighten up my brakes. I was about forty feet from the man when I made these three turns in the brakes. It takes pretty nearly forty feet to get the brake on. As a matter of fact I did not have my brake on until I got up to the buggy; I could not get it on any quicker. It took me forty feet before I got the brake on. At the same time I reversed the power with one hand, and set the brake with the other. The power was reversed, and the wheels were going backward, when I reached the place where the buggy and horse were. The reversed power was on about four or five feet from the horse and buggy. It was three or four feet before the wheels began to go backward, and forty feet before the brakes were on. The car slid about fifty feet after I struck the buggy. After I got in collision with the buggy, I could not do anything else than just keep the power on and setting the brakes. I had the power reversed, and I had the brakes on all the time. When I saw Mr. Yergy, he just looked up a little about the time I came to him. He kind of turned his head up against me—I mean by that, looking at me. I was standing above him, on the platform. He just turned his head up, and looked a little bit. The horse was across the track when we hit the buggy, just about three or four feet. The front wheels of the buggy were just on the rail—two wheels on each rail, and we crashed right into the buggy between the two wheels. The body of the buggy was not under

the car at all. It never got under the car. After striking the buggy, Mr. Yergy's body got under the car, just about forty-five or fifty feet. Mr. Yergy's body did not get under the car until we got past the north line of Lyndale avenue. Up to that distance we had been shoving the buggy and the man ahead of us."

Ruth Bower, a girl of fifteen years of age, testified that she was at the crossing when Mr. Yergy passed. She said: "The car was coming pretty fast down the hill, and the gong was sounding, and I was waiting for the buggy to cross, and while I was standing there I heard the crash, and I turned around and saw the smash-up. The man was driving at a slow trot. He was just sitting still in the buggy. He did not see me; he was looking straight ahead. I made an outcry. I said, 'Look out! you will get hurt,' and he did not pay any attention to that. Mr. Yergy did not seem to hear me when I called to him. I did not think he heard me at all."

Walter Card testified that he was a passenger on the car in question; that his attention was attracted by the sounding of the gong; that he looked out, and saw the man in the buggy, who was apparently either absorbed in thought or sleeping. The witness continued: "He was sitting in a kind of a crouched position, looking down in the street ahead, neither to the right nor to the left. The gong had been sounding up until then. Until the car was right on to him you might say he didn't appear to know who was in the way. He then attempted to gather up his lines, and to either get across the track or whip up the horse, but was hit before he could do so. The car was going at the ordinary rate of speed. When I saw the buggy, I saw the motorman put on his brakes, trying to stop the car. I could not say what effect it had on the car, as to stopping it. As soon as the extra loud sounding of the gong commenced, I looked out and saw the horse. The horse was then just off the crossing, and the buggy was still on the crossway. The horse extended the length of the horse into Benton avenue. I did not think there was any reason to apprehend danger when I saw this man

and the buggy in that position. I saw him lift his head. He was close to the track then. The horse must have been just about over the track when he lifted his head. He looked as if he recognized the fact that he was in danger; that was apparently the first time that he recognized the fact that he was in danger. The electric light was quite distinct. I had no trouble in seeing around there."

Frank J. Wise testified that he saw Mr. Yergy on the evening in question, just before the accident happened; that he was driving in a kind of a dogtrot. "He was sitting in the buggy kind of stooped down; he had a cloth coat and a fur collar. He did not notice us at all apparently; passed very close to us. I saw the car coming. I could see the light. The car was moving rapidly, just as it generally was. The gong was sounding, and the accident happened just at the same time. Mr. Yergy never looked up. I heard the gong sound, and my attention was called to him when that man came to a stop, and then it all happened in just a twinkling of an eye, in less time than it takes me to tell it. That is the only time I heard the gong sound. The motorman sounded the gong immediately before he hit the man. It was all in the twinkling of an eye, like a flash of lightning. The car did not seem to stop right at once; it went quite a little distance. It went on past the corner. It was not very light there. There was a dim light there. There was an electric light. It was just about light enough to see the wheels of the car, but you could not see whether they were revolving."

Mrs. Frank J. Wise testified that she was with her husband. "Mr. Yergy was near the track when I heard the gong, driving along. He was dressed in an overcoat, and he had the collar up, and was kind of looking down. When he passed us, he was sitting in the buggy in the same position. He paid no attention to us at all; didn't seem to notice us. I did not see him paying any attention to the sounding of the gong. It only took a few seconds to enact the whole thing. When I heard the gong sound, the car was about two or three hundred feet south of Lyndale avenue; that was what drew my attention to the car—the gong.

It was two or three seconds between the sounding of the gong and the striking of the buggy. I think my husband is mistaken when he says that the sounding of the gong was so near to the hitting of the buggy that the whole happened in the twinkling of an eye. I think there was a more appreciable time. That is what drew my attention to it. When the car was two or three hundred feet away, the buggy was on the other side of the crossing; near the crossing—the foot crossing on Lyndale avenue. When the buggy and horse were crossing the footwalk on Lyndale avenue, the car was two hundred feet away, as near as I can tell.”

Paul Bickel testified: “I was on the front part of the car. I saw the buggy before the car struck it. I should say the car, when I first noticed it, was about ninety feet from the crossing—maybe not that far—and at that time the buggy was just across the sidewalk. The motorman’s bell was ringing at that time, and I heard it distinctly. He was applying the brakes all the time; at the same time he was ringing the bell. I should think that the motorman reversed the current; the jar would indicate that he did. The horse had just got by, and it hit the buggy, and it crushed right under the car, and the man went with it. I should say that the car was running about eight or or nine miles an hour. I should think the car was about ninety feet from the crossing of Lyndale and Benton avenues when I heard the gong ring, and that was the time when I saw the buggy. It was brightly lighted around there so that I could see. There was no obstruction there. As far as I can remember, the horse was just across the middle of the street, trotting along about five miles an hour, about half as fast as the car was going.”

As we understand the complaint (and this understanding is based partially upon statements in the briefs of counsel for the respondent), the theory of the pleader was that the proximate cause of the death of Mr. Yergy was the negligence of the defendants after the collision took place. We think this is the only ground of negligence stated in the complaint. Error is assigned

upon the action of the court in overruling defendants' motion for a nonsuit. It is true, in our judgment, that no evidence of willful conduct was introduced; but we do not regard the allegation of the complaint relating thereto as being of the *gravamen* of the pleading. It simply stands by itself, and no conclusion seems to be predicated upon it. (See *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837.) The second ground of the motion was that the testimony of the plaintiff disclosed the fact that deceased was guilty of contributory negligence precluding a recovery. Bearing in mind that the negligence charged was founded upon the failure to exercise reasonable care after the collision; that there was no evidence as to the precise moment of time at which Mr. Yergy was killed, and no evidence as to what, if any, efforts were made to stop the car, we are not prepared to say that the action of the court in overruling the motion would not have been error had the defendants elected to rest their case upon it, and had they not supplemented the plaintiff's case by their own testimony, followed by their decision not to object to instructions allowing the jury to predicate negligence upon the conduct of the motorman between the time he first observed Mr. Yergy and the moment of collision. But the testimony on the part of the plaintiff was very materially supplemented by that of the motorman himself, and also by that of Mr. Bickel and Mrs. Wise. Under these circumstances we may not inquire whether the court erred in refusing to grant the motion for a nonsuit. Defendants' testimony cured the defects in that of plaintiff. (*Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *T. C. Power & Bro. v. Stocking*, 26 Mont. 478, 68 Pac. 857.)

We shall assume, for the purposes of this decision, that Mr. Yergy was negligent in placing himself in a situation of peril. It is not a violent inference that he was asleep in his buggy up to a moment just prior to the collision. The testimony of the motorman, however, is to the effect that he saw deceased, and appreciated his peril, when the car was forty feet south of Lyndale avenue. He then sounded the gong. Edgerton testified

that the car was fifty to one hundred feet from the crossing when the gong first sounded; while Bickel testified that he heard the sound when the car was ninety feet south of the crossing, and Mrs. Wise said she heard it when the car was two or three hundred feet from the point of collision. Peterson testified that the speed of the car was eight miles per hour, and plaintiff's testimony tended to show that, going at that rate of speed, the car could have been stopped in the space of twenty feet. This testimony, which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of last clear chance before the moment of collision.

The court instructed the jury, without objection, as follows: "(6) The jury are instructed that it is the duty of the motor-man running a street-car to keep a constant lookout for persons approaching the track; and, on the approach of a person or vehicle near the track with the apparent purpose of crossing, to use every means in his power, consistent with the safety of his passengers, to stop the car and avoid a collision; and, if the jury believe from the evidence in this case that the injury and death of George O. Yergy were caused by the failure of the motorman to keep such constant lookout, or to use the means within his power to stop the car and avoid the collision, the defendants are liable for the injury and death of the said George O. Yergy.

"(7) The court instructs the jury that it is the duty of a street railway company to so regulate the movement of its cars at the intersection of streets as not to unnecessarily expose drivers of vehicles to the dangers of collision. It is consequently the duty of the street-car company to have its car under control, and to operate the same with reasonable care at street intersections; and, if it fails in the duty, then it is liable for such damages as may happen to a person injured because of such failure.

"(8) You are further instructed that, if a person be seen approaching the tracks of the defendant electric street railway, who is apparently capable of taking care of himself, the motor-man may assume that such person will not attempt to cross the

track if danger is imminent, or that he will leave the track before the car reaches him; and this presumption may be indulged in so long as the danger of injuring him does not appear imminent, and it is not necessary for a motorman to slacken the speed of a car upon seeing a person approaching the crossing of the street railway until such danger does (not) appear to him imminent.

“(9) The court further instructs the jury that the duty of a street railway company, and its motorman in charge of a car, to control the same at street intersections, in order to avoid collision, does not arise solely when a person is on the track, but also obtains if his danger was apparent while he was approaching the track.”

The following instruction was also given: “(11) If the jury believe from the evidence that the deceased, George O. Yergy, got upon the track of the street-car, or was in the act of approaching the track in such a way as to indicate to the motorman, or apprise the motorman in charge of the car, that he was in the act of getting upon the track, far enough ahead of the car that the motorman, in the exercise of ordinary care, could have seen that fact in time, and either by stopping the car or arresting its motion, and thus avoided injuring Yergy, and you believe from the evidence that the motorman failed to do this, then the law is for the plaintiff, although you may believe that Yergy himself was negligent.” The record discloses no objection to this instruction, but does show that the defendants *excepted* to the same “upon the ground that there was no evidence in the case to support the instruction based upon the divisibility of the accident.” This exception, even though we could consider it in the absence of a prior objection, was not well taken, for the reason, as we have heretofore pointed out, that there was testimony in the record to warrant it, provided the complaint was so framed as to cover that ground of negligence. The latter question, however, was not raised by the exception. It is apparent, therefore, that the cause was tried on the theory,—in which defendants participated,—that negligence could prop-

erly be predicated, not only upon the failure of Peterson to exercise reasonable care after the collision, but also, after Yergy was discovered in a situation of peril, before that event.

But it is contended by the appellants, quoting from the opinion of the court in *Louisville & N. E. Co. v. Young*, 153 Ala. 232, 45 South. 238, 16 L. R. A., n. s., 301, that "the negligence to liability consists in a failure to perform the duty declared, and not in the ultimate effect produced." Assuming this to be a correct statement of the law, the jury in this case, in the light of Peterson's testimony, and the fact that the car ran more than eighty-seven feet after the collision, may have believed that he made no reasonable effort to stop, after (as he said) "I saw that he was in a point of danger, and did not pay any attention to things."

Defendants requested the court to charge the jury as follows: "(1) You are instructed that the basis of this action is negligence. Negligence may be defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do under the circumstances of a given case. Before you can find for the plaintiff, therefore, you must find the defendants to have been guilty of negligence as alleged in the complaint; and, if the deceased was himself guilty of negligence which proximately contributed to the injury complained of, he cannot recover." The court modified this instruction by adding thereto, "except under the condition and the law as defined to you hereinafter." The record discloses no objection to the modified instruction, but does show that the defendants excepted thereto, for the reason that the instruction as given "destroyed the right of the defendants to a verdict in the event that the negligence of the deceased was the proximate cause of the injury." But we shall consider this instruction in connection with others which involve the same question of law.

Defendants also requested this instruction: "(9) You are hereby instructed that, if you find from the evidence that the

car was running at a moderate or ordinary rate of speed, and that the bell or gong had been sounded, and that the plaintiff suddenly and without warning, and under circumstances which were not reasonably to be expected, drove upon or attempted to cross the track of the defendant company in close proximity to the car of the defendant company, and at a time when it was not prudent to do so, then and in that event deceased would not be exercising ordinary care or prudence, and your verdict must be for the defendants." The court made this addition thereto: "Unless you further find from the evidence that the defendants might have avoided the injury to the said George O. Yergy by the exercise of ordinary care after the collision took place, as hereinafter stated. If the jury believe from the evidence that the death of George O. Yergy was brought about by the want of ordinary care on the part of the motorman in charge of the car in running at a rate of speed in excess of that permitted by the ordinances of the city of Helena, or in failing to have the car under such control as that its speed might have been lessened, or the car stopped, and if they further believe from the evidence that such want of ordinary care, if any, continued after the collision between the car and the vehicle driven by said George O. Yergy, and after said Yergy was under said car, then whatever negligence that Yergy might have been guilty of in being upon the track at the moment of collision cannot be said to have been the proximate cause of his death, their verdict should be for the plaintiff." With relation to this instruction, and the action of the court thereon, the record recites: "To the refusal of the court to give instruction No. 9, as requested by the defendants, and to the giving of said instruction No. 9 as modified as instruction No. 10, the defendants then and there *objected*, upon the ground that there was no evidence to warrant the giving of the modification, and that the modified instruction would permit the jury to find for the plaintiff, although the contributory negligence of the deceased was the proximate cause of the accident." It is earnestly contended, in the reply brief of appellants, that the court erred in this connection, because

the instruction as modified allowed the jury to predicate negligence for which recovery could be had upon a continuance of the same primary negligence which was offset by the contributory negligence of the deceased, and thus destroyed the defense of contributory negligence. Cases are cited which seem to sustain the appellants' position, but we cannot consider them or the alleged error. In so far as the instruction requested is concerned, what is hereafter said with reference to request No. 14 disposes of the same. It will be observed that, technically, no exception was saved to the action of the court in refusing to give the instruction requested. But we pass that. The fact that no exception was taken to the action of the court in overruling the objection to the modified instruction, makes it impossible for this court to consider the ruling of the court below. (See *Robinson v. Helena Light & Ry. Co.*, *supra*.)

The defendants also requested this instruction: "(12) You are instructed that it was the duty of the deceased, George O. Yergy, before going on or across the track of the defendant company, to look and listen for approaching cars of said defendant company; and if you find from the evidence that the deceased, George O. Yergy, failed so to do, and that by looking and listening he could have seen or heard the approaching car of the defendant company in time to have averted the injury to himself, then you must find your verdict for the defendant, unless you further find from the evidence that the employees of the defendant, engaged in the operation of its car, after they saw, or by the exercise of ordinary care could have seen, that deceased was in a position of peril, failed to use such care and caution in stopping said car to avoid injury to said deceased, George O. Yergy, as a person of ordinary care and prudence would have exercised under like and similar circumstances." This instruction the court refused to give, and defendants excepted, upon the ground that the refusal did away with the defense of contributory negligence. The court, however, did charge the jury that if the injury to Yergy could have been avoided by the exercise of ordinary care, after he was discov-

ered in a place of peril, or after the collision, then the defense of contributory negligence was not available to the defendants. The court also, in instruction No. 1 (being defendants' request No. 1 as modified, heretofore considered), told the jury that if the deceased was himself guilty of negligence which proximately contributed to the injury complained of, plaintiff could not recover, "except under the condition and the law as defined to you hereafter." The court also told the jury that it was "the duty of a person approaching the crossing of a street railway in a street to use his senses, his eyes and ears, to discover the proximity and passage of the cars of the railroad company, before proceeding across the track, and a failure to do so would constitute contributory negligence." In instruction 15 the court defined contributory negligence as follows: "The court instructs the jury that one of the defenses interposed by the defendants in this action is contributory negligence on the part of George O. Yergy. Contributory negligence may be defined as follows: One who through the mere negligence of another suffers an injury, to the bringing about of which the willfulness or want of ordinary care on the part of the injured person has so far proximately contributed as that, but for such concurring and co-operating fault, the injury would not have happened." We are of opinion that all the instructions, taken together, left the jury free to consider the defense of contributory negligence, and that they must have understood from the instructions given that there could be no recovery unless the doctrine of last clear chance could, under the testimony, be successfully invoked by the plaintiff.

The following instruction was also requested: "(14) If you believe from the evidence that said George O. Yergy drove upon said railway track after he saw, or by the use of ordinary care and watchfulness could have seen for a distance of at least five hundred feet, the said car of the Helena Light and Railway Company approaching the crossing at ordinary speed, when by stopping his horse before going upon the tracks a collision could have been avoided, your verdict should be for the defendants."

This instruction was properly refused, for the reason that it would have enabled the jury, had they followed it, to find for the defendants regardless of the question of defendants' conduct after deceased was discovered in a place of peril; and other instructions were given properly dealing with this question.

Requested instruction No. 17 reads as follows: "Even if you believe from the evidence that the defendants were negligent in the management of the said car at the time and place alleged, and that the said George O. Yergy was in no respect negligent, unless you find that the defendant then and there managed said car in both a willful and recklessly negligent manner, your verdict should be for the defendants." This instruction was properly refused, for the reasons heretofore stated in relation to the same subject matter, and for the further reason that there was evidence in the case sufficient to warrant a verdict for the plaintiff, aside from any question of willful or reckless conduct on the part of the defendants.

The defendants also requested the following instruction: "(19) You are instructed that, if you find from the evidence that the deceased and the defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of, then your verdict should be for the defendants." This was properly refused, for the reasons applicable to request No. 14.

Instruction No. 12, which the court gave, reads as follows: "The court instructs the jury that street-cars propelled by electricity cannot be lawfully run at a rate of speed which is incompatible with the lawful and customary use of the street by others with reasonable safety. Nor can such cars be lawfully run at a rate of speed in excess of that allowed by ordinance. So in this case, if you find from the evidence that there is an ordinance of the city of Helena prohibiting electric cars, at the place where deceased George O. Yergy came to his death, to run at a greater speed than twelve miles per hour, and that at the time and place of such death of said Yergy the defendant's car was running at a greater speed than such twelve miles

per hour, and the death of said Yergy was occasioned thereby, then the defendants were guilty of negligence, and are liable for the damages resulting therefrom." Defendants contend that by this instruction "the jury was told that, if Yergy's death was caused by a speed of more than twelve miles per hour, 'defendants are liable for the damages resulting therefrom.'"

The record recites that the following proceedings were had with reference to this instruction: "To the giving of which said instruction the defendants then and there excepted, upon the ground that there was no evidence in the case to support the instruction, and that it did away with the defense of contributory negligence." There is ample evidence in the record to warrant the conclusion that the car was propelled at a rate of speed exceeding twelve miles per hour, and at an excessive rate of speed. But we are not permitted to consider the assignment of error, because the defendants either failed to object to the instruction, or to except to the ruling of the court (if the court ruled). (See *Robinson v. Helena Light & Ry. Co.*, *supra*.) The law reads thus: "The court shall pass upon the objections to the instructions requested and also those proposed to be given by the court. * * * No motion for a new trial on the ground of errors in the instructions given shall be granted by the district court unless such errors are specifically pointed out and excepted to at the settlement of the instructions. * * * No cause shall be reversed by the supreme court for any error in instructions, which was not specifically pointed out and excepted to at the settlement of the instructions, * * * and such error and exception incorporated in and settled in the bill of exceptions or statement of the case." (Revised Codes, sec. 6746.) We are not disposed to be technical about the use of terms, but if the foregoing extract from the record discloses an objection to the instruction, then there was no exception to the ruling of the court, if the court did rule; and, if it be claimed that an exception was saved, then there was no prior objection and ruling to which the exception can apply. The trial court must be given an opportunity to rule, before it can be put in error. And the

mandate of the statute applies as well to this court as to the court below; the language employed by the legislature being, "And no cause shall be reversed by the supreme court," etc.

We find in the reply brief of the appellants some criticism of other instructions, but do not discover in the record any objection to these instructions, or any exception to the action of the court in giving them. If, as is suggested in the reply brief of appellants, there be any error in those instructions of the court, which engrafted the so-called "discovery doctrine" upon the doctrine of last clear chance, it may be said that the same proposition was incorporated in one of the instructions requested by appellants themselves, and the instructions given were not objected to.

The following instructions, relating to the measure of damages, were given to the jury: "(19) The jury are instructed that, if your verdict shall be for the plaintiff, such damages may be given by you to the plaintiff as under all the circumstances of the case may be just, not exceeding the amount prayed for in the complaint. And in determining the amount of such damages you have the right to take into consideration the pecuniary loss, if any, suffered by the plaintiff in the death of said George O. Yergy, by being deprived of his support.

"(20) You are instructed that the measure of damages in this action is the present value of such a sum as you believe the deceased would probably have earned in his business during his natural lifetime, and left as his estate at the time of his death, considering his age, ability, disposition to work, habits of living, and expenditures, the capital he had at his command, and the risks incident to his business."

Respondent's counsel state in their brief that instruction 20 was given at appellants' request; but, as the record does not show this, we may not act upon the information. It is now contended that the court erred in allowing the witnesses Sanford and Goodwin "to testify to the earning capacity of the deceased." And it is said: "The jury were to find as the measure of damages the amount which the deceased would probably

have earned and saved. The question which should have been propounded was the value to his business of the services which he rendered." It is unnecessary to decide whether instructions 19 and 20 were erroneous, for the reason that there was no objection to them in the court below. Mr. Sanford's testimony was well within the rule now contended for by the appellants, and we think he was sufficiently qualified to express an opinion. His answer seems to have been founded entirely upon his knowledge of Mr. Yergy's personal capacity. But, assuming that the motion to strike Mr. Goodwin's testimony should have been granted, still the action of the court resulted in no prejudice to the defendants. Mr. Sanford's testimony was uncontradicted, as was also that of the insurance men, to the effect that an annuity of \$5,000 would have cost Mr. Yergy the sum of over \$70,000. The elements of passion and prejudice will not be presumed to have influenced the minds of jurors who return a verdict, based on competent testimony, in accordance with instructions, and easily to be arrived at by mathematical calculation. We find no error in the case justifying an unconditional reversal of the order or judgment.

But the plaintiff alleges that she is the sole dependent heir of the deceased. His estate inventoried \$70,000, and there is an intimation in the record that its real value exceeded that sum. The size of this verdict is so great as to somewhat shock the mind, unless the amount be justified by the circumstances of the case. This court, and the district court, has the power to require that the plaintiff either remit a part of the amount awarded by the jury, or submit to a new trial, in cases where the damages are clearly excessive. (*Chicago T. & T. Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506; *Storm v. City of Butte*, 35 Mont. 385, 89 Pac. 726; *Western Union Telegraph Co. v. Bodkin* (Kan.), 101 Pac. 652.) The law is that such damages may be given as under all the circumstances of the case may be just. (Revised Codes, sec. 6486.) In this particular case we have felt justified, in view of the circumstances and the fact that the information we seek is contained in public records made by the plaintiff herself, and easily accessible, in pursuing an extrajudi-

cial inquiry. The records in the office of the clerk of the district court for Lewis and Clark county disclose, in substance, that the entire estate was left to Mrs. Yergy for life, with certain remainders over to three brothers, one sister, and one nephew of deceased, all of whom are nonresidents of Montana, none of whom, according to the allegations of the complaint, were dependent upon the deceased; and that the approved claims against the estate amount to less than \$1,500. The course pursued by the court in making this inquiry is not to be construed as a precedent, for the reason that we have been actuated solely by the amount of the verdict in this particular action. The result of this litigation will be that the sum recovered by the plaintiff as executrix will simply be added to the fortune of which she will come into possession when the estate is finally settled, and at her death will go to persons who were in no way dependent upon Mr. Yergy in his lifetime. We are not unmindful of the fact that plaintiff has been under expense for the services of counsel; but the amount to which we reduce the judgment will enable her to pay reasonable attorneys' fees, and add a substantial sum to the assets of the estate.

The cause is remanded to the district court, with directions to grant a new trial, unless, within thirty days after the filing of the *remittitur* with the clerk of that court, the respondent shall file her consent in writing that the judgment may be modified by deducting from the amount thereof, as of the date of its rendition, the sum of \$25,000, leaving the amount of said judgment the sum of \$15,000. If such consent is given, then the judgment shall be modified accordingly, and in that event the judgment, as modified, and the order denying a new trial, will stand affirmed, the respondent to recover costs of appeal.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY: I concur in the result reached in the foregoing opinion, and also in the propositions of law laid down, but I do not think that it is ever necessary or permissible to make an extrajudicial investigation in order to reach the proper result in any case.

**MADISON RIVER LIVESTOCK CO., APPELLANT, v. OSLER
ET AL., RESPONDENTS.**

(No. 2,666.)

(Submitted June 7, 1909. Decided June 14, 1909.)

[102 Pac. 325.]

Livestock—Conditional Sales—Breach—Remedies—Election.

Conditional Sale—Breach by Buyer—Seller's Remedies.

1. On the breach of a conditional sale contract by the buyer, the seller may treat the contract as rescinded and retake the property; or retake the property and still treat the contract as in force, but broken by the buyer, and sue for damages occasioned by the breach; or waive the breach and insist upon payment for the property.

Same—Wrongful Retaking of Property—Effect.

2. Where the retaking of personal property sold under a conditional sale, is wrongful, the action of the seller constitutes a violation of the contract, and the buyer may treat it as rescinded.

Same—Livestock—Rescission of Contract—Counterclaims—Quantum Meruit.

3. Where livestock was sold conditionally and the seller wrongfully retook the same, the buyers could treat the contract as rescinded, and, on an action by the former to recover on a note evidencing the latter's indebtedness under the contract, maintain their counterclaim on the *quantum meruit*, for pasturage and labor performed in handling the stock.

Election of Remedies—Conclusiveness.

4. An election between coexisting remedial rights which are inconsistent, when made with full knowledge of the facts, is irrevocable and conclusive, irrespective of intent, and constitutes a bar to any action based upon a remedial right inconsistent with that asserted by the election.

Conditional Sale—Livestock—Retaking of Property—Election—Effect.

5. Where a seller of livestock which had been sold conditionally, elected to treat the contract of sale as rescinded because of an alleged breach of it by the buyer and retake the property, he elected to take it as he found it, and could not thereafter insist upon payment for animals which had died while in the buyer's possession.

Same—Livestock—Breach of Contract—Evidence.

6. Defendants agreed to provide feed for livestock conditionally sold to them, to the amount of 400 tons annually. The evidence showed that they had only 235 or 250 tons between the time the agreement was entered into and the time the animals were retaken by the seller. *Held*, that this fact alone did not constitute a breach of the contract on their part, so as to entitle plaintiff to reclaim the property. A substantial compliance was sufficient, and if the amount of hay provided was ample to feed the stock during the time feeding was necessary (as the jury found), plaintiff's action in retaking it was wrongful.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by the Madison Livestock Company against Mary D. Osler, as administratrix of the estate of John Osler, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Mr. A. C. Gormley, Mr. Geo. R. Allen, and Mr. S. V. Stewart,
for Appellant.

Defendants' alleged counterclaims do not state facts sufficient to constitute a defense or any cause of action against the plaintiff. They have not pleaded a rescission of the contract. (*Cotter v. Butte & R. V. Smelting Co.*, 31 Mont. 134, 77 Pac. 509; *Miller v. Steen*, 34 Cal. 138; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369; *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Forley v. Rich* (Utah), 99 Pac. 666; *Hanson v. Fox* (Cal.), 99 Pac. 489.) Nor have they pleaded a renunciation of it. (*Victor Safe & Lock Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 216; 2 Mechem on Sales, 1087; 9 Cyc. 637; 8 Current Law, 1797; see, also, *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.)

Even, however, were the facts alleged sufficient to show a renunciation of the contract, so as to entitle the other party to sue, the rule of damages is that he is entitled to compensation, based on the ascertainment of what he would have suffered, by the continued breach of the other party, down to the time of complete performance. (2 Mechem on Sales, secs. 1088-1090; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.) Each counterclaim must state a cause of action complete in itself. (*Babcock v. Maxwell*, 21 Mont. 512, 54 Pac. 943; *Power & Bros. v. Turner*, 37 Mont. 521, 97 Pac. 954.) Had the cattle been taken by the plaintiff against the will of the defendants, we still contend that this would not in any way affect the contract of sale or permit defendants to recover on their counterclaims. (1 Mechem on Sales, secs. 621-623; *Tufts v. D'Arcambal*, 85 Mich. 185, 24 Am. St. Rep. 79, 48 N. W. 497, 12 L. R. A. 446.)

The weight of authority is that, where personal property is sold and delivered to the vendee, under an agreement that title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price. (6 Am. & Eng. Ency. of Law, 455; 8 Current Law, 1819, 1820; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. 1052; *La Valley v. Ravenna*, 78 Vt. 152, 112 Am. St. Rep. 898, 62 Atl. 47, 22 L. R. A., n. s., 97, 6 Am. & Eng. Ann. Cas. 684; *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540, 5 South. 627; *Tufts v. Griffin*, 107 N. C. 47, 22 Am. St. Rep. 863, 12 S. E. 68, 10 L. R. A. 526; *Jessup v. Fairbanks, Morse & Co.*, 38 Ind. App. 673, 78 N. E. 1050; *Vapereau v. Holcombe*, 122 Iowa, 406, 98 N. W. 279; *Phillips v. Hollenberg Music Co.*, 82 Ark. 9, 99 S. W. 1105; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A., n. s., 590; *Humeston v. Cherry*, 23 Hun (N. Y.), 141.)

Mr. Geo. H. Stanton, and *Mr. J. A. McDonough*, for Respondents.

"The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person founded on the sale and delivery of the same goods for the recovery of the price." (*Morris v. Rexford*, 18 N. Y. 552; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Parke & Lacy Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Bailey v. Hervey*, 135 Mass. 174; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Seanor & Bierer v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Campbell Printing Press & Mfg. Co. v. Henkle*, 19 D. C. 95; *Earle v. Robinson*, 91 Hun, 363, 36 N. Y. Supp. 178; 6 Am. & Eng. Ency. of Law, 480.)

Where one party to a contract is prevented from completing the contract within the time specified, by reason of the other party's neglect, failure or refusal to perform his part, he is not obliged to bring his action upon the contract to enforce payment, but may resort to the *quantum meruit* to obtain his compensation. (*Spaulding v. Coeur d'Alene Ry. & Nav. Co.*, 5 Idaho, 528, 51 Pac. 408; *Wolf v. Marsh*, 54 Cal. 228; *Thomas v. McManus*, 23 Ky. Law Rep. 837, 64 S. W. 446; *White v. Livingston*, 174 N. Y. 538, 66 N. E. 1118; *Jenson v. Lee*, 67 Kan. 539, 73 Pac. 72; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327; *Day v. Eisele*, 76 App. Div. 304, 78 N. Y. Supp. 396; *Wood v. Kaufman*, 135 Mich. 5, 97 N. W. 47; *Buck v. Pond*, 126 Wis. 382, 105 N. W. 909; *Angle-Wyoming Oil Fields v. Miller*, 216 Ill. 272, 74 N. E. 821; *William Butcher-Steel Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560; *Alcorn v. Harmonson*, 2 Blackf. 235; *Chance v. Commissioners of Clay Co.*, 5 Blackf. (Ind.) 441, 35 Am. Dec. 131; *Preston v. Whitney*, 23 Mich. 260; 9 Cyc. 603.)

The vendee, under an agreement that title shall remain in the vendor until payment, is relieved from further liability in case of loss or accidental destruction of the property. (6 Current Law, 1382; *Bishop v. Minderhout*, 128 Ala. 162, 86 Am. St. Rep. 134, 29 South. 11, 52 L. R. A. 395; *Swallow v. Emery*, 111 Mass. 355; 1 Benjamin on Sales, 400; see, also, *Randle v. Stone*, 77 Ga. 50; *Stone v. Waite*, 88 Ala. 599, 7 South. 117; *J. M. Arthur & Co. v. Blackman*, 63 Fed. 536.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On December 22, 1903, the Madison Livestock Company entered into a contract with the defendants for the conditional sale by the plaintiff company to the defendants of certain cattle, horses and harness. The contract provides that the cattle should be paid for at the rate of \$32.50 per head; that the plaintiff should furnish certain supplies and money; that defendants should have possession of the property; that payment should be made by defendants in five years; and that the title to

the property should remain in the plaintiff until payment was fully made. The contract contains this provision: "And it is further agreed that if at any time the parties of the second part fail to comply with their part of this agreement, and the said party of the first part shall feel insecure, then the said party of the first part shall, on demand, have the quiet and peaceable possession of such cattle and stock." The defendants evidenced their indebtedness to the plaintiff by two promissory notes, the latter of which was secured by chattel mortgage. In the spring of 1904 the plaintiff, presumably assuming to act under the provision of the contract quoted above, took possession of the property, or rather such portion as was then in existence—fifty head of cattle having died in the meantime. While by the terms of the contract the purchase price was not to be paid until five years from December 22, 1903, one of the notes was made payable on demand, and the other was made payable one year after date. When the property was retaken by the plaintiff, credit was given upon one of the notes for \$11,200, presumably the market value of the property retaken. In 1905 the plaintiff brought this action to enforce payment of the balance due on the first note and to foreclose the mortgage securing the second. To the complaint the defendants interposed an answer denying any indebtedness, setting forth the history of the transaction, and alleging that the defendants had fully performed all the terms of the contract by them to be performed, and that the retaking of the property by the plaintiff was wrongful and without the consent, and against the will, of defendants. The answer also contained three separate counterclaims—for hay fed to the stock by the defendants, for pasturage furnished by them, and for work and labor done in handling the property—all of which was alleged to have been furnished and done by the defendants at the special instance and request of plaintiff. There was a reply, which put in issue all the new matters set forth in the answer. Upon the trial the jury returned a verdict in favor of the defendants for \$4,675, and judgment was entered thereon, from which judgment the plaintiff appeals. The

specifications of error relied upon raise but two questions: (1) Do the counterclaims state causes of action in favor of the defendants and against the plaintiff? (2) Was the plaintiff in any event entitled to recover the unpaid portion of the purchase price after crediting the value of the property retaken, or for the value of the stock which had died?

1. It is insisted that the hay and pasturage furnished were furnished and the work done was done under the contract of December 22, 1903, and the defendants cannot recover anything therefor. Apparently the hay and pasturage were furnished and the work was done under the contract in the first instance; and it is elementary that *under the contract* the defendants are not entitled to recover. But it is alleged in the answer that the plaintiff wrongfully took the property from the possession of the defendants, and the jury so found in a special finding. The plaintiff insists that the defendants breached the contract, but the evidence upon that is conflicting, and the jury found against it upon that issue. But, assuming that plaintiff's contention is correct, it then might have had any one of three remedies: (a) It might have treated the contract as rescinded or abrogated and have retaken the property; or (b) it might have retaken the property, but still treated the contract as in force but broken by the defendants, and brought an action for damages occasioned by the breach; or (c) it might have waived the breach and have insisted upon payment for the property. (8 Current Law, 1818; Williston on Sales, sec. 579; 1 Mechem on Sales, sec. 615.) Apparently the plaintiff, contending that the defendants had violated the contract, undertook to pursue the first of these remedies; but, having retaken the property wrongfully, as the jury found, what, if any, remedies were then available to defendants? The authorities are unanimous in holding that they might have successfully prosecuted an action in claim and delivery to recover the possession of the property. Since the jury found that the plaintiff's act in retaking the property was wrongful, such retaking constituted a violation of the terms of the contract, and, such being the case, the defendants might

likewise treat the contract as rescinded. (7 Am. & Eng. Ency. of Law, 2d ed., 124; 9 Cyc. 639.) The act of plaintiff in retaking the property under the circumstances as disclosed by this record and as found by the jury is treated by some courts and text-writers as amounting to a rescission of the contract, by others as a renunciation of the contract, and by others still as amounting to a determination to treat the transaction as "no sale," in which event there would be a total failure of consideration; but by whatever term designated it amounts, in fact, to a complete abrogation of the contract, so far as plaintiff is concerned, and leaves the defendants free to likewise treat the contract as abrogated, or to pursue any other remedy allowed them by law. If, then, the contract was by these acts of the parties abrogated, there was not any consideration whatever for either note sued upon by the plaintiff. The defendants, having furnished their feed and pasturage for, and done their work upon, plaintiff's property, may maintain their several counterclaims upon the *quantum meruit*. (7 Am. & Eng. Ency. of Law, 2d ed., 152, and cases cited.)

2. Was the plaintiff entitled to recover for the value of the stock which was not retaken? It is insisted that the loss for the stock which died fell upon the purchasers. Whether it did or not is a much mooted question, but one which is not before us. As said above, if plaintiff deemed that the defendants had broken the contract, it had its election of remedies, and, having chosen the remedy which it would pursue, its choice became irrevocable. Upon the plainest principles of justice it cannot retake the property, renounce the contract, and at the same time insist upon payment under the contract. (*Parke & Lacy Co. v. White River L. Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435.) The rule is stated in 15 Cyc. 262, as follows: "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that

asserted by the election, or to the maintenance of a defense founded on such inconsistent right"; and the authorities in support, of the text are cited at length. Having elected to treat the contract as rescinded, the plaintiff also elected to take the property as it found it, and cannot now insist upon payment of any part of the contract price. Treating of a contract of this particular character, Mechem in his work on Sales, section 615, says: "He [the vendor] may treat the contract as rescinded upon the default of the buyer, and recover his goods. If he does this, he has no other remedy." In Williston on Sales, section 579, the author says: "If the seller exercises his right to reclaim the goods, it is generally held an election to rescind the contract, and thereafter an action for the price or any unsatisfied balance of it is not allowed." (See, also, 2 Current Law, 1588, note.)

It is urged by counsel for appellant, in effect, that there is not any evidence to support the finding that the retaking of the property by the plaintiff was wrongful. The contract contains this provision: "Said parties of the second part further agree * * * to make ample provisions for the care of said stock by erecting sheds, and providing food to the extent of 400 tons of hay annually." Assuming, as we may, that by this provision it was intended that the defendants should annually make ample provision for caring for the property by providing sufficient feed for such portion of the year during which feeding would be necessary, and that 400 tons of hay were deemed sufficient for that purpose, it can hardly be urged that the mere fact that the defendants had only 235 to 250 tons of hay to feed from December 22, 1903, until the following spring, constituted a breach of the contract, which of itself warranted the plaintiff in retaking possession of the property. The provision above set forth must be interpreted in the light of conditions prevailing here. During one winter a very small quantity of feed might be sufficient, while during another 400 tons of hay might be inadequate. But, if the 235 or 250 tons of hay which defendants had was sufficient prop-

erly to winter the stock during the remaining portion of the season of 1903 and 1904, after December 22, 1903, then it would be said that there was a substantial compliance with the above provision of the contract; and we think the evidence is sufficient to show that the hay which defendants fed to the stock practically completed the necessary feeding for that season. It must have been upon this theory that the jury found that plaintiff's act in retaking the stock in the spring of 1904 was wrongful.

We do not find any error in the record. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH con-
cur.

HAUSER ET AL., APPELLANTS, v. NEWMAN, RESPONDENT.

(No. 2,669.)

(Submitted June 9, 1909. Decided June 16, 1909.)

[102 Pac. 334.]

Default Judgment—Setting Aside—When Proper.

1. Plaintiffs commenced an action in a justice's court by filing a complaint. Defendant's answer was an oral denial and, a trial having resulted in plaintiffs' favor, defendant appealed to the district court. When the record was lodged in that court it was found that the complaint had been lost and plaintiffs asked leave to file a substitute. The motion was granted. The only change in the new pleading was an immaterial one in the title of the cause. About nine months thereafter plaintiffs asked that the default of defendant be entered for failure to answer the substituted complaint. A motion to strike defendant's original answer for refusing to sign his deposition was then pending. The default was entered and later set aside on motion. *Held*, that defendant having evidently been misled by plaintiffs' conduct, in supposing that the cause stood for trial upon the issues made by defendant's oral denial, the default was properly set aside.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by William Hauser and others, as trustees of Fargo Lodge No. 5, A. O. U. W., an unincorporated society, against William W. Newman. From an order setting aside a default judgment, plaintiffs appeal. Affirmed.

Mr. John A. Shelton, for Appellants.

Mr. M. F. Canning, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order setting aside a judgment entered by the clerk of the district court on entry of default against defendant. The cause originated in a justice's court in Silver Bow county. It was begun by the filing of an account showing an indebtedness by balance due from defendant to Fargo Lodge No. 5, A. O. U. W., of \$145, with interest thereon from February 6, 1900, at the rate of seven per cent per annum. It appears from the justice's docket that the cause was entitled "*William Hauser, E. McGregor and S. H. Wilder, Trustees of Fargo Lodge No. 5, A. O. U. W., v. Willis W. Newman.*" Subsequently an amended complaint was filed, the apparent purpose of which was to set forth formally plaintiff's cause of action. The defendant's only answer seems to have been an oral denial entered in the docket of the justice. The trial resulted in a judgment for plaintiffs. Thereupon the defendant appealed to the district court, wherein the transcript and record from the justice's court was filed on March 31, 1906. When the record was lodged with the clerk, it was found that both the original and amended complaints had been lost or mislaid. On March 6, 1907, counsel for plaintiffs, upon affidavits made by himself and the justice, alleging that the complaint had been lost, moved for leave to file another to supply its place. The court granted the application by an order entered June 24, 1907, and the pleading was filed on the following day. In the meantime, on March 14, upon notice and in pursuance of the statute (Revised Codes,

sec. 8001), the deposition of the defendant had been taken before the justice who had originally tried the cause, but upon its completion he had refused to sign it. Thereupon, on June 6, counsel for plaintiffs moved the court under the provisions of section 7980, Revised Codes, to strike out defendant's answer, basing the motion upon the affidavit of the justice showing his disobedience in refusing to sign his deposition. This motion was never disposed of, but was pending at the time the default and judgment were entered against the defendant. On March 26, 1908, counsel for plaintiffs filed with the clerk proof that he had caused a copy of the amended complaint to be served upon counsel for defendant on June 25, 1907. At that time he filed a praecipe directing the clerk to enter the default of defendant for his failure to answer the substituted pleading. This the clerk did, and thereupon entered judgment for the amount demanded by the plaintiffs. On November 30, 1908, on motion of the defendant, the court entered the order setting aside the default and judgment. The motion was based upon the ground, among others, that the so-called amended complaint was intended, at the time it was filed, merely as a substitute pleading to supply the place of the one lost from the files, and hence that the cause stood for trial upon the issues made upon it by the defendant's oral answer, as shown by the transcript of the justice's docket.

The affidavits in support of the motion for leave to file the pleading clearly indicated the purpose of counsel. It is true that in the substituted pleading there was added to the title the name of George A. McGregor as an additional trustee of Fargo Lodge No. 5, but this was apparently the only change in it. The fact that it was intended to be a substitute pleading, taken together with the subsequent delay of counsel in proceeding to demand default, as well as the fact that the motion to strike out defendant's answer for refusal to sign his deposition was still pending and undetermined, seem clearly to justify the conclusion that the determination by plaintiffs' counsel that the amended complaint required answer, and that the defendant was

in default for failure to file one, was an afterthought. In our opinion, counsel was properly denied the advantage thus gained by a change of front, after defendant and his counsel had evidently been misled by him in supposing that the cause stood for trial upon the issues already made.

The order of the district court is affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

SHOBER, JR., APPELLANT, v. DEAN, RESPONDENT.

(No. 2,672.)

(Submitted June 9, 1909. Decided June 16, 1909.)

[102 Pac. 323.]

Brokers—Real Estate—Right to Commission—"Indirectly" Interesting Purchaser—Evidence.

1. Defendant had employed plaintiff, a real estate broker, to find a purchaser for his ranch. The contract provided that if the sale was made to one who had become interested in the property through plaintiff's efforts, directly or indirectly, he was to receive a commission of \$500. Through plaintiff's endeavors one G. was induced to inspect the ranch, and the latter, while not becoming a purchaser himself, imparted the information thus obtained to P., who thereupon in conjunction with another entered into negotiations with defendant owner directly and bought the property. *Held*, that plaintiff was entitled to the commission, inasmuch as through his efforts a chain of events was set in motion which finally culminated in the sale.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by John H. Shober, Jr., against Thomas Dean. From an adverse judgment, plaintiff appeals. Reversed, and remanded for new trial.

Mr. C. B. Nolan, and Mr. E. A. Carleton, for Appellant.

Messrs. McConnell & McConnell, and Mr. E. H. Goodman, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff, John H. Shober, Jr., is now, and has been for several years, a real estate broker. In 1908 the defendant, Thomas Dean, owned a ranch near Townsend, in Broadwater county, which he desired to sell. He employed the plaintiff to effect a sale of the property. The contract between the parties, after describing the property and mentioning the terms of sale, provides: "I agree to pay said agent \$500.00 commission for selling said property upon sale thereof by him, me or any other person. I reserve the right to advance my price after April 1, 1908. [Signed] Thomas Dean." Contemporaneously with the signing of the contract by the defendant the plaintiff indorsed thereon this memorandum: "Supplementary to Within Contract. I hereby agree that owner may retain the right to sell the within property himself to parties who have not become interested in it through my agency in any way directly or indirectly, and in the event of such sale I agree to accept \$100 as my full commission. [Signed] J. H. Shober, Jr." A controversy having arisen as to the amount of commission to which the plaintiff was entitled upon the sale of the property, this action was brought. Upon the trial the jury returned a verdict in favor of the plaintiff for \$100, and judgment was entered thereon, from which judgment and an order denying him a new trial the plaintiff appeals.

There is little, if any, substantial conflict in the evidence. The record discloses that, immediately after listing the property, the plaintiff prepared several hundred circulars describing it, and sent them out to prospective purchasers and to men who had made inquiry of him for lands. Otto Gaudlitz, a resident of Wibaux, Mont., seeking to purchase a ranch in the neighborhood of Townsend, enlisted the services of this plaintiff who furnished Gaudlitz with literature descriptive of the Dean ranch, took him over the ranch, and showed it to him. Gaudlitz, however, purchased from plaintiff another ranch in the same general neighborhood, and then returned to Wibaux,

where he had a conversation with John Payne, also a resident of Wibaux, in which conversation Gaudlitz described to Payne the Dean ranch, and gave him such information as he (Gaudlitz) had acquired from his trip over the ranch with the plaintiff. He also informed Payne that Shober was the agent for the sale of this ranch. Acting upon the information furnished by Gaudlitz, Payne came to Townsend, went to the Dean ranch and inspected it, and returned to Wibaux, where he imparted his information to Frank Cannon, who seems to have been interested with Payne in seeking to purchase a ranch for Payne. Acting upon the information received from Payne, Cannon came to Townsend, went to the Dean ranch, inspected it, and entered into negotiations with Dean directly, which resulted in a sale of the ranch by Dean to Payne and Cannon. There is not any controversy over these facts, and the other matters brought out on the trial are not of any material consequence in determining this controversy. Upon the conclusion of the evidence counsel for plaintiff asked the court to direct a verdict in favor of the plaintiff for \$500, the amount to recover which the action was brought. The request was denied, and this ruling of the trial court furnishes the ground upon which a reversal is sought. The other assignments need not be considered.

The contract between these parties, omitting the memorandum or supplemental portion, is one common form of contract, and is designated in the books as an exclusive brokerage contract; that is, one under which the broker would be entitled to his compensation upon the sale of the property, during the term of the contract, whether the sale was effected by the broker, or through his efforts, or effected by the owner, or by someone else independently of the broker. (19 Cyc. 264.) With the supplemental portion attached the contract was limited somewhat in its scope, and under its provisions Shober could not claim the maximum commission if the sale should be made by Dean himself to some one who had not become interested in the property through the efforts of Shober, directly or indirectly. Shober was entitled to \$100 upon a sale in any event; and, if

the sale was made to one who had become interested through his efforts, directly or indirectly, then he was entitled to \$500 commission; and this brings us to a consideration of the one question before us, *viz.*, Did Cannon and Payne become interested in the Dean ranch through the efforts of Shober, directly or indirectly?

The word "agency," used in the memorandum, means effort, action, or instrumentality, and the word "indirectly" means by other than direct means. If Shober had sent one of his circulars, descriptive of the Dean ranch, to Payne or Cannon; or had posted signs or placards describing the property, and Payne or Cannon had seen them; or had advertised the property in a newspaper, and Cannon or Payne had seen the advertisement; or had exhibited the property to either one of them; or if he had interviewed either, or furnished him information respecting the property; or had brought either Payne or Cannon to Dean for the purpose of having him inspect the property; or had given Dean the name of Payne or Cannon as a prospective purchaser, and, as a result of any one or more of these things, the sale had been made by Dean—it would be held to have been the direct result of Shober's efforts. (*Derrickson v. Quimby*, 43 N. J. L. 373; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Bell v. Kaiser*, 50 Mo. 150; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Tyler v. Parr*, 52 Mo. 249; *Stinde v. Blesch*, 42 Mo. App. 578; 23 Am. & Eng. Ency. of Law, 2d ed., 910.) If, then, by any of the foregoing acts, or similar acts, the efforts of Shober would constitute the direct or procuring cause of the sale, what acts of his did the parties have in contemplation when they used the term "indirectly" in this contract? It appears to us that there can be but one answer: It was intended that, if the efforts of Shober set in motion a chain of events which finally culminated in a sale of the property, then he should recover the maximum fee; and this appears to us to be just the case made out by the evidence, which is undisputed. (*Lincoln v. McClatchie*, 36 Conn. 136.) If Shober had not exhibited the property to Gaudlitz, or if Gaud-

litz had not imparted to Payne the information furnished by Shober, there is not anything in this record to show that Payne or Cannon would ever have heard of the Dean ranch; but, whether they would or not, the fact remains that Shober's efforts indirectly brought the ranch to their notice, and interested them to the extent that they came from Wibaux to Townsend and examined the property, with the result that the sale was effected.

For the reasons given, the trial court erred in refusing to direct a verdict, and for the error the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. POWERS, APPELLANT.

(No. 2,689.)

(Submitted June 10, 1909. Decided June 16, 1909.)

[102 Pac. 583.]

Criminal Law—Homicide—Jury—Challenge to Panel—Self-defense—Instructions—Information—Date of Death—Surplusage—Variance.

Criminal Law—Drawing Jurors—Challenge to Panel.

1. The fact that two judges of a district court, divided into departments, sat together when an order for the drawing of jurors for their departments was made, is not ground for challenge to the panel.

Same—Judicial Authority—Delegation—Challenge to Panel—Presumptions.

2. The court in making the order above referred to appointed three members of the bar to supervise the drawing of jurors. The record on appeal did not disclose that during the drawing the attorneys thus appointed attempted to exercise any judicial functions. *Held*, that the court's action did not constitute a valid ground for challenge to the panel as a delegation of judicial power. The presumption obtains that the judges and clerk did their duty.

Same—Jurors—Names—Clerical Errors—Challenge to Panel.

3. Where "M. Meyer" responded to a summons to jury duty, and the original juror's slip bore his proper name and place of residence, the fact that the venire contained the name of "F. Meyer" and the sheriff's

return showed that "Ed. Meyer" had been served was not ground for challenge to the panel. The names of "F. Meyer" and "Ed. Meyer" held to have been clerical errors.

Same—Evidence—Degree of Proof—Moral Certainty—Statutes.

4. The provision of section 7847, Revised Codes, that moral certainty, or that degree of proof which produces conviction in an unprejudiced mind, is all that is required, held applicable to criminal causes.

Homicide—Self-defense—Instructions—Burden of Proof.

5. The court having instructed the jury that if it appeared to defendant, as a reasonable person, when he killed deceased, that it was necessary to do so in self-defense, he had a right to act on such appearances, although he was in no actual danger; that no greater burden rested on him than to raise a reasonable doubt concerning his guilt, and that if, after considering all the evidence, the jury were not satisfied beyond a reasonable doubt of his guilt, he should be acquitted,—the giving of the further instruction that defendant's cause of apprehension must have been reasonable and that it was for the jury to determine whether the facts constituting such reasonable cause of apprehension had been established, and, if not so established, defendant was not entitled to acquittal, could not have misled the jury into believing that the burden of proof was upon defendant to show that his apprehension was a reasonable one. (MR. JUSTICE HOLLOWAY dissenting.)

Same—Self-defense—Instructions.

6. Where the only testimony that deceased assaulted defendant was that of defendant himself, which was not only not corroborated, but facts and circumstances were made to appear from which the jury could properly have determined that his version was not true, the refusal of an instruction on self-defense which proceeded upon the theory that defendant was confronted by the actual fact that deceased was attempting to commit a felony or do some great bodily injury upon the person of accused, was properly refused.

Same—Unnecessary Instructions.

7. Where, in a criminal action, the court had properly charged the jury on all branches of the case, refusal to instruct that each juror should render his verdict according to the law as given in the instructions, and according to the evidence; that private knowledge or belief acquired otherwise must be disregarded; that the verdict should not be based on probabilities of defendant's guilt; and that, even though the evidence might establish in their minds a strong suspicion or a probability of defendant's guilt, he should not be convicted unless they were convinced of his guilt beyond a reasonable doubt, was proper.

Same.

8. Error was not committed in refusing an instruction that the physical power and strength of the defendant and deceased should be considered by the jury in arriving at a verdict in a prosecution for homicide. While properly a subject matter for argument to them, it was not one to be incorporated in the charge.

Same—Information—Date of Death—Surplusage—Variance.

9. Held, that in an information charging murder it is not necessary to allege the date upon which deceased died, as distinguished from the date of assault; and that therefore the contention that there was a fatal variance between a pleading which charged that deceased was killed on a certain day and the evidence which showed that, while he was assaulted on that day, he died two days later, was without merit.

Appeal from District Court, Silver Bow County; Michael Donlon, Judge.

MICHAEL J. POWERS was convicted of manslaughter, and appeals. Affirmed.

Mr. James T. Fitzgerald, and Mr. B. S. Thresher, for Appellant.

The record fails to disclose anything the court or clerk did in the drawing of the jury panel after the appointment of the commission. It does not even say that the drawing was conducted fairly or as provided by law. The record should state how the drawing was actually done. (*State v. Payne*, 6 Wash. 563, 34 Pac. 317.) A jury panel must be drawn in substantial conformity with the requirements of the statute, and the provisions of the code are in their essential particulars mandatory. (*State v. Landry*, 29 Mont. 218, 74 Pac. 418.) The persons designated by statute to draw the jury must do so, and if a person not authorized by law to act does participate, the jury so drawn is illegal. (*State v. Payne, supra*; 24 Cyc. 219, 229, 230.) M. Meyer, drawn as a juror, was nothing more than an intruder; and appellant's challenge should have been sustained. (*Goodwin v. State*, 102 Ala. 87, 15 South. 571.)

Superior physical strength of assailant, and ill-health of appellant, are circumstances of inequality of the two, and the jury should have been properly instructed as requested. (*Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760; *State v. Benham*, 23 Iowa, 161, 92 Am. Dec. 416; *State v. Crea*, 10 Idaho, 88, 76 Pac. 1016; McClain's Criminal Law, sec. 305.)

It was necessary that the information state the time and place, as well of the infliction of the wound, of the death of the party, in order to fix the venue, and that it may appear on the record that the deceased died within a year and a day after receiving the injury. (*People v. Wallace*, 9 Cal. 31.)

For a thorough discussion of the rule above stated, see *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377.

The allegation in the information that the appellant did then and there willfully, etc., kill and murder, was material and absolutely necessary; and that the evidence should substantiate such an allegation beyond a reasonable doubt is beyond question. The evidence shows that White was not instantly killed; nor does the evidence show where he died. (*State v. Cummings*, 5 La. Ann. 330.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The above-named defendant was charged with murder, and convicted of manslaughter, in the district court of Silver Bow county. He appeals from the judgment and an order denying a new trial.

1. The first error assigned by the defendant relates to the action of the court in overruling a challenge to the panel of jurors in attendance upon the court. This challenge was interposed after a trial jury had been accepted by both parties, and just after the court had ordered that the jurors so accepted should be sworn. The three grounds of the challenge will be considered in the order in which they were interposed.

(a) It appears from the record that the judges of departments Nos. 2 and 3 of the district court of Silver Bow county, sitting together, made the order for the drawing of jurors for the two departments. This cause was afterward tried in department No. 3. We do not regard the fact that the judge of department No. 2 sat with the judge of department No. 3 when the order was made, and that the order related to jurors for both departments of the court, as being of any importance. There is but one district court in Silver Bow county. The portion of the challenge relating to this feature was properly overruled by the court.

(b) At the time said order was made, the court appointed three members of the bar of Silver Bow county to supervise the drawing of jurors. Defendant's counsel now contend that this

action amounted to a delegation of judicial authority to these three members of the bar. We do not regard the point as well taken. Whatever local reason there may have been for the action of the judges in requesting these gentlemen to be present at the time the jurors were drawn, we do not know; but the record does not disclose that they attempted to exercise any judicial functions, and the presumption is that the judges and the clerk of the court did their duty.

(c) The third ground of the challenge to the panel was that one M. Meyer was on the panel, whereas in fact the venire for the jury contained the name of "F. Meyer," and the sheriff's return shows that "Ed. Meyer" was served. We do not regard this as any reason why the whole array or panel should be set aside by the court. The record shows that no challenge was interposed to M. Meyer as an individual juror; he was examined for cause and passed. The defendant failed to exhaust all of his peremptory challenges, and accepted the jury while M. Meyer was in the box. The examination of M. Meyer shows that he possessed the necessary qualifications to sit as a juror. The record also discloses that the original slip drawn from the jury-box bore his name; that he was personally served by the sheriff, and responded to the summons. The original juror's slip bore the inscription "Meyer, M., 211 W. Park," which was the proper name and residence of the juror in the box. The only reasonable conclusion is therefore that the names "F. Meyer" and "Ed. Meyer" were clerical errors, and nothing more.

2. The second ground of complaint is that the court instructed the jury that: "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind." We think this instruction was properly given. It is an exact copy of section 7847, Revised Codes, and is found under the title, "General Definitions of Evidence," and is properly ap-

plicable to criminal cases. This court, in the case of *Territory v. McAndrews*, 3 Mont. 158, said: "Moral certainty is the very highest grade of certainty that human testimony can produce." (*State v. Martin*, 29 Mont. 273, 74 Pac. 725.)

3. Again it is contended that the court erred in giving instruction No. 17 to the jury. The instruction reads in part as follows: "The court instructs the jury that the right to defend one's self against danger, not of his own seeking, is a right which the law not only concedes, but guarantees, to all men. The defendant may therefore have killed deceased, and still be innocent of any offense against the law. If, at the time he cut deceased (if you find from the evidence, beyond a reasonable doubt, that he did so), he had a reasonable cause to apprehend on the part of the deceased a design to do him some great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and to avert such apprehended danger, he cut or stabbed deceased, and at the time he did so he had reasonable cause to believe it necessary for him to use his knife in the way he did to protect himself from such apprehended danger, then, and in that case, the cutting was not felonious, but was justifiable, and you ought to acquit him on the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to fall. All that is necessary is that the defendant had reasonable cause to believe, and did believe, these facts. But, before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence you are to determine; and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit in such cause, on the ground of self-defense, even though you may believe that defendant really thought he was in danger. • • • "

The gist of the argument is that this instruction "placed the burden of proof upon the appellant of establishing by evidence

the fact that appellant believed then and there that he was in danger such as justified him in justifiable homicide, whereas the law is that all appellant needs to do is to raise a reasonable doubt in the minds of the jury as to whether or not such was necessary." We do not consider the point as well taken. The court also instructed the jury: "(63) The jury are instructed that if it appeared to the defendant, at the time he struck White, as a reasonable person, that it was necessary for him to do as he did in order to save his own life, or to prevent receiving great bodily injury, he had the right to act upon such appearances, and to do as he did although he was in no actual danger. (64) In this connection the jury are instructed that no greater burden rests upon the defendant than to introduce sufficient evidence to raise a reasonable doubt concerning his guilt. If, after a consideration of all of the evidence in the case, including that offered by the state, as well as that offered by the defendant, you are not satisfied beyond a reasonable doubt of the defendant's guilt, you should give him the benefit of the doubt and acquit him." And, also: "In any case no greater burden rests on the defendant than to introduce evidence sufficient to raise a reasonable doubt." In view of these instructions, and others found in the record, we do not think the jury could have been misled by the phraseology of instruction 17, even though it would bear the construction placed upon it by his counsel, which we seriously doubt.

4. Instruction No. 21 is complained of for the reason, as it is contended, that the instruction tells the jury "that manslaughter may be committed upon a sudden passion." A careful reading of the instruction convinces us that this construction may not reasonably be placed upon the instruction.

5. Again it is urged that it was error for the court to refuse to give appellant's requested instruction No. 73. The instruction reads as follows:

"In deciding what force may be necessary to use when resisting an attempt to commit a felony on one's person, or to

do some great bodily injury to one's person, the court instructs you, gentlemen of the jury, that a person may act upon the circumstances as they may appear to him at the time, and he is not to be held criminal because a calm survey of the facts afterward shows that the use of extreme means might by a possibility have been avoided.

"The right of self-defense is not limited or confined to those cases where the attack or assault is unexpected. When the attack is actually made, one has a right to repel it, no matter for how long a time he may have anticipated it. If you believe from all the evidence that Michael C. White attempted to commit a felony, or to do some great bodily injury upon the person of the accused, and the accused so believed at the time, it was not incumbent upon the defendant to retreat or fly for safety, but he was justified in standing his ground and defending himself, and killing his adversary."

The first paragraph of the instruction eliminates from the consideration of the jury the question of what a reasonable person would apprehend under all the circumstances. But it is contended that this defendant was confronted, not by appearances from which different men might draw different conclusions, but by actual facts and circumstances of which there could be no doubt under the testimony, to-wit, that deceased was attempting to commit a felony, or to do some great bodily injury upon the person of the accused. The defendant was the only witness who testified that White assaulted him. This testimony was not only not directly corroborated, but there were facts and circumstances from which the jury might have determined that it was not true. Under these conditions the court properly allowed the jury to decide how much, if any, of defendant's testimony they would believe.

6. The defendant requested instruction No. 74, as follows: "The court instructs you, gentlemen of the jury, that each individual juror must render his verdict according to the law as defined by the court in these instructions, and according to the evidence legally produced in this case. You must disre-

gard your own individual private knowledge or belief, acquired otherwise than from the evidence and the instructions of the court produced and given in this case. You are not to form or base your verdict upon probabilities of the guilt of the defendant. And even though the evidence in this case may establish in your minds a strong suspicion or a probability of the defendant's guilt, he should not be convicted unless you are convinced of his guilt beyond a reasonable doubt." If the jury is properly instructed on other branches of the case, there is never any necessity for giving this instruction. It contains a reflection on the intelligence of the jurors. However, the subject matter of the instruction was fully covered by other instructions given to the jury.

7. The defendant requested the court to instruct the jury that "the physical power and strength of the defendant and the deceased are matters to be considered by you in arriving at your verdict." We think there was no necessity for giving this instruction. Jurors naturally take such matters into consideration, and the subject matter of the instruction might properly be argued to them. What has just been said applies also to requested instruction No. 76, which the court refused.

8. It is contended that there is a fatal variance between the allegations of the information and the proof. The information alleges that the deceased (White) was killed on the 14th of June, 1907, and the proof was that he was assaulted on June 14, and died on June 16, 1907. Murder was properly charged by the information. (See *State v. Hayes*, 38 Mont. 219, 99 Pac. 434; *State v. Nielson*, 38 Mont. 451, 100 Pac. 229.) We hold that it is not necessary, in Montana, to allege in an information for murder the date upon which the death occurred as distinguished from the date of assault. All that is necessary in order to constitute the crime of murder, the other requisite facts being proven, is that the death of the party occurred within a year and a day after the stroke received or the cause of death administered. (Revised Codes, sec. 8297.)

We find no error in the record, and the judgment of the district court of Silver Bow county and the order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I dissent. In my judgment, instruction No. 17 is erroneous, and, if given any consideration whatever by the jury, it must have been prejudicial to the defendant. That portion of the instruction which is particularly erroneous is as follows: "But before you acquit on the ground of self-defense, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence you are to determine; and, unless the facts constituting such reasonable cause have been established by the evidence in the cause, you cannot acquit in such cause, on the ground of self-defense, even though you may believe that defendant really thought he was in danger." Since it was not incumbent upon the state to establish the facts showing that defendant's apprehension was a reasonable one, the jury must have understood that the burden of proving those facts rested upon the defendant. In my judgment, by the use of the term *establish*, as employed here by the court, the jury could not have understood that the only burden cast upon the defendant was to introduce evidence sufficient only to raise a reasonable doubt of his guilt. There is not any substantial difference, in principle, between this instruction and instruction No. 30, given in *State v. Crowe*, ante, p. 174, 102 Pac. 579, and held to be prejudicially erroneous. The word "establish" means: "To make stable or firm; to fix immovably, or firmly; to settle; to confirm." (Webster's International Dictionary.)

The record discloses that seventy-one instructions were given in this case. Ten instructions, each plainly stating a rule of law applicable to the facts, would have been of some service to the jury; but the mass of instructions submitted could not

have had any other effect than utterly to confuse the jury, if any attempt was made to search for the meaning of the court.

Rehearing denied October 6, 1909.

HAMILTON, APPELLANT, v. THE MONIDAH TRUST ET AL.,
RESPONDENTS.

(No. 2,601.)

(Submitted June 11, 1909. Decided June 17, 1909.)

[102 Pac. 335.]

New Trial—Insufficient Evidence—Duty of Court—Discretion.

New Trial—Insufficient Evidence—Duty of Court.

1. It is the duty of the district court to grant a new trial, if in its opinion the evidence, in weight, did not justify the verdict rendered.

Same—Evidence—Conclusions—Discretion.

2. Where, in a boundary dispute, the evidence submitted by plaintiff, upon whom rested the burden of proof, was based chiefly upon conclusions relative to the location of his original stakes, without facts to warrant them, the court did not abuse its discretion in awarding a new trial to defendants.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Patrick J. Hamilton against the Monidah Trust, a corporation, and others. From a judgment granting defendants a new trial, plaintiff appeals. Affirmed.

Mr. L. P. Forestell, and Mr. I. A. Cohen, for Appellant.

Mr. Jas. E. Murray, and Mr. W. N. Waugh, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an action in ejectment brought to recover the possession of the east 10 feet of lot No. 28, in block No. 23, of the original townsite of Butte, in Silver Bow county. The jury

returned a verdict in favor of the plaintiff, which verdict was, on defendants' motion, set aside by the court and a new trial ordered. From the order granting a new trial, plaintiff appeals.

The ground actually in controversy is .20 of a foot in width at the southerly, or Broadway, end thereof, and runs in a northerly direction for a distance of 50.35 feet, gradually widening as it runs toward the north, until at the northerly end it is .49 of a foot in width; and also a strip of ground on the westerly side of the east 10 feet of lot 28, which is 28 feet 3 inches long and .15 of a foot wide throughout its entire length. A cause between the plaintiff and defendants' grantor, involving the same strip of land, was heretofore in this court on appeal. (See *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75.) In that case the court speaking through Mr. Commissioner Callaway, said: "The *gravamen* of the action is to discover where the boundary line is between the lands of the plaintiff and defendant. * * * The way to find the boundary line is to actually locate the lines upon the ground, and, if the original stakes can be found, they will be the very best evidence of the exact *locus* of the land in question." In an attempt to make proof as to the location of the original stakes, the plaintiff produced the deposition of an engineer and surveyor, named Malcolm L. McDonald, who testified, in substance: That he made a survey of the ground in 1892 and found the original stake on the north end of the line between lots 28 and 29, and also the stake at the south end of that line. They were badly decayed. "I recognize them as being the original stakes, in comparison with other stakes that I found in the district. They were not government stakes. They were stakes set there by—I believe it was McFarlane, who originally surveyed the townsite. I was familiar with them. By original stakes, I refer to the stakes that were set there at the time the Butte townsite was surveyed. As to whether I know of my own knowledge, I know by comparison with other stakes that are found all over the Butte townsite. They were covered up to some depth. When we got down to the original ground I found the stakes. From my ex-

perience of several years surveying in the Butte district, I was, at the time, entirely familiar with those stakes. I was not there when the original survey was made, and never saw any stakes placed there at the time it was surveyed. Those stakes that I found were covered up. I pretend to say that those stakes were the original town stakes of the Butte survey. I base my conclusion by comparison with other stakes, by comparison with many stakes that were set over the different blocks in the Butte townsite. Whoever surveyed the original townsite, I presume, set them there. I did not see them set there, so I do not know who placed those other stakes there that I compared those particular stakes with. My statement that those were the original stakes is based on the conclusion that the stakes that I compared them with were original townsite stakes, stakes that we have always assumed as being the original townsite stakes. I do not think it was an assumption on my part that those stakes were the same as the original stakes. It was a comparison; I was satisfied at the time that they were, from the fact that they were covered up and were in the original loam. They were just at the bottom of the fill. I should say we had to dig five or six feet at the back, and about eight feet at the south end, before we got to those stakes. One of those stakes was badly decayed, and the other was not. It was nearly destroyed. You could see the shape of the hole, and the decayed wood was in the hole. I should say it was pine wood. I do not remember that I examined it. I was satisfied at the time it was the original stake and never went any further in my investigation. I merely found the stakes and concluded that they were the original stakes, and then I proceeded to take my measurements from those points, assuming that they were in their original position. I had a man dig the stakes up, and I watched and helped him." The testimony shows that, in its natural state, a gulch ran through the vicinity of the ground in controversy, and that a portion of the ground, at least, had been filled in to a considerable extent since that time.

It was shown on the part of the defendants that at the trial of the case of *Hamilton v. Murray*, *supra*, the plaintiff testified

as follows: "Q. Now, Mr. Hamilton, you say that there was a stake on the north side, on the alley, between lots 28 and 29. Is that right? A. Yes, sir; between lots 28 and 29. That is right. I recognize them and knew where they were before they were knocked down long enough. Afterward they were knocked down. Q. How long did that stake remain there after it was placed by McFarlane? A. Well, to the best of my knowledge, it remained there for eighteen months or a couple of years after; in fact all the stakes. There was hardly any thoroughfare. There were only a few people in Butte. Q. What became of that stake? Was it knocked down, or did it stay there? A. It was knocked down. I don't know whether it was knocked down or not. But afterward, afterward I am talking about." Samuel Barker, Jr., a civil engineer, testified: "There are no original stakes of the lots of the Butte townsite, and there has not been for several years."

David Mikeljohn testified: "I have been street commissioner of Butte and know the lots on the southeast portion of block 23. I know nothing of the original stakes between lots 28 and 29 prior to the time I was street commissioner. I know of the ground, but not of the stakes. That was in 1883 and 1884. There were no stakes there in 1883 and 1884 that could be found on the northeast corner of that property by Mr. Harper at that time. I was with him. I will state that in the McFarlane [survey] there was a great deal of difficulty in establishing the right lines afterward, on account of the filling, and the dispute came up when they were hunting for the stakes, and there were stakes found; but they could tell nothing about them. * * * To my knowledge there was no distinguishing characteristic of the Butte townsite survey from which you could determine whether or not a stake found upon the ground in 1892 would [be] the original stake. I was with Mr. Harper at the time he made a survey of this ground. It was the time we were surveying for a sewer down that street and filling in that I was with him. It might have been in 1892, but I think it was in 1893." The original townsite survey was made in 1876. The

plaintiff testified that the building owned by the defendant, The Monidah Trust, encroached upon his ground; but his evidence shows that he had no facts to warrant this conclusion. (See *Howie v. California Brewery Co.*, 35 Mont. 264, 88 Pac. 1007.)

The foregoing is by no means all of the evidence given at the trial; but it is sufficient to illustrate the situation of the district court at the time the motion for a new trial was submitted. If McDonald found the original stakes in place, then the verdict of the jury was warranted by the testimony, and a new trial should not have been granted. Whether he did or not was a question primarily for the jury to decide; but if the court was of opinion that the evidence, in weight, did not justify the verdict, it was its duty to grant a new trial. (*Harrington v. Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102.) The burden of proof rested upon the plaintiff, and the accuracy of McDonald's map depended upon his testimony as to the location of the original stakes. This testimony at best amounted simply to a conclusion that the stakes found by him were original stakes. In fact, he was unable to say that the stakes formerly seen by him, with which he compared those found in 1892, were original stakes. There was nothing peculiar about the stakes. There is no concrete testimony whatever to the effect that the stakes found in 1892 were original stakes, and the extent of McDonald's testimony is that they resembled other stakes, which he assumed were original stakes. Aside from this the evidence of other witnesses seems to cast considerable doubt upon the value of his evidence. Under these circumstances, we are not prepared to say that the court abused its discretion in granting a new trial, and the order appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

SULLIVAN, RESPONDENT, v. GIRSON ET AL., APPELLANTS.

(No. 2,676.)

(Submitted June 11, 1909. Decided June 17, 1909.)

[102 Pac. 320.]

*Claim and Delivery—Findings—Nature of Action—Parties—
Present Possession—Opinion and Expert Evidence—Secondary
Evidence.*

Claim and Delivery—Findings—Responsiveness to Issues.

1. In claim and delivery, a general finding of the issues in favor of plaintiff includes all the issues, except that of value; therefore the contention that the general verdict in such an action was insufficient to support the judgment, in that it did not specifically find that at the commencement of suit defendants wrongfully detained from plaintiff the possession of the property in dispute, was without merit.

Same—Nature of Action—Parties.

2. The purpose of an action in claim and delivery being to recover possession of specific property, or the value of it in case possession of it cannot be had, the person who at the commencement of suit has possession of and wrongfully detains it, is the proper person to be sued.

Same—Present Possession by Defendant—Evidence.

3. Evidence which showed that defendants, engaged in the pawn-broking business, admitted that they had a ring which was the subject matter of a suit in replevin, on the day before suit and on the day action was begun but before it was actually brought, held sufficient to have made out a *prima facie* case of the present actual possession by defendants at the time the action was commenced.

Same—Opinion Evidence—Value.

4. A witness who had purchased a ring about two and one-half years prior to the time it became the subject of an action in claim and delivery, and who testified that he had frequently priced and purchased precious stones in different cities and knew what stones of the size and quality of those in the ring were selling for in the city in which the controversy arose, was competent to estimate its value, even though he had not qualified as an expert.

Same—Expert Evidence—Value.

5. An expert on precious stones was properly allowed to give an opinion, as to the value of a ring, based upon its description and a comparison of it with a similar one exhibited to the jury.

Same—Secondary Evidence—When Proper.

6. *Semble*: It would seem that, after refusing to produce a ring sought to be recovered in an action in claim and delivery, for inspection by witnesses and jury, and thus rendering it impossible for plaintiff to present the best evidence of its value, defendants ought not to be heard to complain that the best evidence was not produced upon that question.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Sophia Sullivan against David G. Girson and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Mr. L. P. Forestell, for Appellants.

Mr. T. F. Nolan, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery. The plaintiff seeks to recover the possession of one gold ring with Tiffany setting, containing two diamonds and one ruby, of the alleged value of \$1,000. The pleadings present the usual issues as to title and right to possession in plaintiff, the wrongful detention by the defendants, and the value. Upon the evidence submitted upon these issues, the jury returned the following verdict: "We, the jury, find our verdict for the plaintiff and against the defendants. We find that Sophia Sullivan, the plaintiff is the owner and entitled to the possession of the property in controversy, the ring. We find that the value of the ring is eight hundred and fifty dollars (\$850). We find that the plaintiff has been damaged by the detention of the property by the defendants in the sum of no dollars." Judgment was thereupon rendered and entered for plaintiff. Defendants have appealed from the judgment and an order denying them a new trial.

1. The first contention made is that the verdict is not sufficient to support the judgment, in that it does not respond to the material issue of wrongful detention by defendants. Counsel cites *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302, as authority for the proposition that it was incumbent upon the plaintiff to allege and prove that at the commencement of the action the defendants wrongfully detained

the possession of the property from her, and argues that, since the verdict does not specifically find on this issue, it is insufficient. There is no merit in the contention. It may be conceded, as counsel contends, that a mere finding that the plaintiff had the right of possession at the beginning of the action would not sustain a judgment for an unlawful detention; yet a general finding of the issues in plaintiff's favor includes all the issues, except that of value. The verdict here contains the general finding in favor of plaintiff, together with a finding of value. It conforms substantially with the requirements of section 6760 of the Revised Codes, and is amply sufficient to support the judgment. (*Miles v. Edsall*, 7 Mont. 185, 14 Pac. 701.)

2. It is said that the evidence is not sufficient to sustain the verdict, in that it fails to establish the fact that the defendants were in possession of the ring when the action was brought. Whatever may be the rule elsewhere, it is settled in this jurisdiction that the right to maintain the action depends upon the situation and condition of things at the time it is brought. The purpose of it being to recover possession of the specific property, or, in the alternative, the value of it in case the possession cannot be had, the person who has possession of it and wrongfully detains it is the proper person to be sued. The action must therefore fail if the evidence shows that, when it was commenced, the defendant had parted with the possession. (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302; *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345.) In this respect the action differs from an action in conversion. In conversion present possession of the property is immaterial, because the plaintiff seeks compensation for the wrongful taking or detention, by way of damages (*Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414), and it is incumbent upon the plaintiff to go no further than to show his title or right of possession, the value, and the wrongful taking or detention.

This action was brought on October 26, 1907. Plaintiff's evidence tended to show the following: The ring in controversy was taken by the minor daughter of the plaintiff, without her

knowledge, and pledged with the defendants, who are pawn-brokers, to secure a loan of \$80. This was done on October 18, 1907. A day or two afterward the plaintiff, having discovered its whereabouts and obtained the pawn ticket, went to the defendants' place of business and demanded possession. The defendants, admitting that they had it, refused to deliver it up until the loan should be made good. On October 25 or 26, J. J. Sullivan, the husband of plaintiff, in company with an officer, made a like demand. At that time the defendants, according to Sullivan's testimony, admitted that they had the ring and were ready to deliver it up whenever the loan was repaid. A stipulation in the pawn ticket required the defendants to retain possession of the ring and to return it to the pledgor or bearer, upon payment of \$86, at any time on or before November 19. Though the interview was somewhat heated and acrimonious, there was no suggestion by either of the defendants that the ring was not then in their possession. Upon the principle that the admitted prior possession of the defendants on October 25 and on the following day, but before the action was brought, was evidence of such possession during that day (Wigmore on Evidence, sec. 382), the admissions of the defendants, aided by the presumption that the ordinary course of business had been followed (Revised Codes, sec. 7962), was sufficient to make out a *prima facie* case of the present actual possession by defendants at the time the action was commenced, and warranted a verdict for plaintiff in the absence of countervailing evidence sufficient to rebut it. In order to overcome this evidence, the defendant Gibson testified that he had parted with the possession of the ring on the afternoon of Friday, October 25, having deposited it with "a party," with other articles, as security for a loan of \$1,000, and that, when demand was made for it by Sullivan, who came to the store with the officer on October 26, he refused to give it up, but was not asked, nor did he admit, that he had it in his possession. Upon being asked who the party was from whom he had obtained the loan, he stated that he was a jeweler, a friend of his, giving his name as Snyder, doing business on Park street, but could or would not give his

street number nor tell his place of business, except by a somewhat vague general description. He also showed a memorandum in a book, reading, "October 25, diamond ring, \$80, left as security," intending the court and the jury to understand, though not venturing to so state, that the entry had been made as a memorial of his transaction with Snyder. Defendant Neer, after stating that his codefendant had pledged the ring with Snyder on October 25, and that the entry in the book had been made by Girson, related what occurred at the time the demand was made by Sullivan, as follows: "There was a party came in—or a lady and gentleman—I guess Mr. and Mrs. Sullivan. They came in and showed me the ticket, and they said, 'Was this here pawned here?' This was before the suit was started. This was on Saturday afternoon [the 26th], and I said: 'Yes, that ring is here. That ring was pawned here.' And they said, 'The ring is mine, and I want it.' I said, 'I couldn't do anything for you,' and they went away." When questioned as to whether, when the pledge was made with Snyder, any receipt or any other evidence of the deposit had been taken from him, he stated that he did not know. No such evidence was produced, nor was Snyder called to testify.

Taking into consideration the direct and implied admissions made by the defendants subsequent to the time of the alleged pledge to Snyder, as testified to by plaintiff's witnesses, together with their somewhat evasive, incongruous, and contradictory statements on the stand, and their failure to produce the witness Snyder or other evidence to confirm their story of the pledge to him, the credit to which they were entitled presented a question for the jury. It was exclusively within their province to say whether defendants' testimony was of sufficient weight to overcome the *prima facie* case made out by the plaintiff.

3. It is said that the court erred in permitting the witness Sullivan to testify as to the value of the ring, in that he had not qualified as an expert. It appeared from his preliminary statement: That he had frequently priced and purchased precious stones in New York, Chicago, and Butte; that he had pur-

chased the ring in controversy and presented it to the plaintiff about two and one-half years before the trial; and that he knew what stones of the size and quality of those in the ring were selling for in Butte. While he did not qualify as an expert, yet he showed sufficient familiarity with the character of the article and the market price in Butte to be permitted to estimate its value, within the rule, often announced by this court and recognized by the courts generally. (*Holland v. Huston*, 20 Mont. 84, 49 Pac. 390; *Emerson v. Bigler*, 21 Mont. 200, 53 Pac. 621; *Porter v. Hawkins*, 27 Mont. 486, 71 Pac. 664; *Osmer v. Furey*, 32 Mont. 581, 81 Pac. 345; *Wigmore on Evidence*, secs. 716 *et seq.*)

The plaintiff had not secured delivery of the ring at the commencement of the action, and defendants had been notified by plaintiff's counsel to produce it at the trial in order that it might be examined by the witnesses upon the question of its value and be inspected by the jury. The defendants refused to produce it. In order to obtain some expert testimony on the subject of value, Sullivan was permitted to describe the ring, stating the apparent quality and size of the stones, as compared with a similar one exhibited to the jury. Thereupon the witness Barry, a jeweler of experience and for many years a dealer in precious stones, was permitted to express his opinion as to the value of the ring in controversy, by comparison of it with the one exhibited to the jury, upon the description given of the other by Sullivan. Objection was made to this testimony on the ground that it was incompetent, for the reason that the evidence as to the resemblance between the two rings was too vague to furnish the basis of an estimate. That it is competent for an expert witness to base his opinion, as to value, upon a description of the article in controversy, seems too clear to admit of doubt; otherwise, owing to lack of knowledge or capacity in those who have seen it, it would often be impossible to establish its value. An opinion based upon such a description merely may not be so satisfactory as in the case where the witness bases his opinion upon his own observation; yet the admissibility of it rests upon the same basis as an opinion

given in answer to any hypothetical question incorporating a statement of facts. (*Whitebeck v. New York Central Ry. Co.*, 36 Barb. (N. Y.) 644; *Lawson on Expert and Opinion Evidence* 23.) Nor was its competency affected by the fact that another ring was used to illustrate the description given by Sullivan by way of comparison. This, it would seem, was an aid to an understanding of the description, rather than the contrary. In any event, it would seem that, after refusing to produce the ring for the inspection of witnesses and the jury, and thus rendering it impossible for plaintiff to present the best evidence of its value, defendants ought not to be heard to complain that the best evidence was not produced.

We find no error in the record. The judgment and order are therefore affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. GREGG ET AL., RELATORS, v. ERICKSON ET AL., RESPONDENTS.

(No. 2,722.)

(Submitted June 3, 1909. Decided June 21, 1909.)

[102 Pac. 336.]

Statutes—Constitutionality—Legislative Procedure—Enrolled Bill—Conclusiveness—Lincoln County—Validity of Act.

Legislative Procedure—Enrolled Bill—Conclusiveness.

1. An enrolled bill, bearing the signatures of the presiding officers of the two Houses and the approval of the governor, is conclusive upon the courts, and, in determining whether an Act has been properly passed, recourse may not be had to any other evidence, except where the alleged invalidity of an Act is based upon a failure to enter the names of those voting upon its final passage, in which case the journals may be consulted.

Statute—Lincoln County—Validity.

2. Held, that the Act of March 9, 1909 (Laws 1909, p. 193), creating Lincoln county, and providing for its organization and government,

in failing to provide any compensation for the county superintendent of schools, is not upon its face so defective as to defeat its purposes.

ORIGINAL proceedings by the state, on the relation of Robert Gregg and others, against John E. Erickson and others, to determine the validity of the Act creating Lincoln county. Dismissed.

Messrs. Walsh & Nolan, for Relators.

Mr. Thos. D. Long, and *Messrs. Gunn & Rasch*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is a special proceeding commenced in this court, the ultimate object of which is to test the validity of an Act of the Eleventh Legislative Assembly, known as Senate Bill No. 65, approved March 9, 1909 (Laws 1909, p. 193). The enrolled bill on file in the office of the secretary of state is entitled "An Act to create Lincoln county, designate its boundaries, and provide for its organization and government," is properly signed by the speaker of the House and president of the Senate, and bears the approval of the governor. It is contended that the Act is invalid for two reasons: (1) The enrolled bill contains certain amendments, whereas the amendments were in fact not adopted; and (2) the enrolled bill differs materially from the bill which passed the two houses. These contentions are met by the counter contentions that it is not competent to show these facts, or either of them since they do not appear from the enrolled bill itself, nor from the journals if they can be consulted for such a purpose. On behalf of the relators we are urged to go behind the enrolled bill and consult the journals, the original bill, and the engrossed bill, to ascertain whether any amendments were adopted, and whether there is in fact a variance between the bill as it passed the two houses, and the bill as signed by the presiding officers and approved by the governor. In support

of this contention, generally, the following cases are cited: *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Gardner v. Collector*, 6 Wall. 499, 18 L. Ed. 890; *Chicot County v. Davies*, 40 Ark. 200; *Jones v. Hutchinson*, 43 Ala. 721; *State v. Moore*, 37 Neb. 13, 55 N. W. 299; *Ramsey County Board of Supervisors v. Heenan*, 2 Minn. (Gil. 281) 330; *Lankford v. County Commrs. of Somerset County*, 73 Md. 105, 20 Atl. 1017, 11 L. R. A. 491; *Hollingsworth v. Tax Collector*, 45 La. Ann. 222, 40 Am. St. Rep. 220, 12 South. 1; *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635.

State v. Platt, above, was decided in 1870; but it was distinctly overruled by the same court in 1893, in *State v. Town Council of Chester*, 39 S. C. 307, 17 S. E. 752. In this latter case the court said: "We announce that the true rule is that, when an Act has been duly signed by the presiding officers of the general assembly, in open session in the Senate and House, approved by the governor of the state, and duly deposited in the office of the secretary of the state, it is sufficient evidence, nothing to the contrary appearing upon its face, that it passed the general assembly, and that it is not competent, either by the journals of the two houses, or either of them, or by any other evidence, to impeach such an Act."

Gardner v. Collector, above, *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219, and *Lyons v. Woods*, 153 U. S. 649, 14 Sup. Ct. 959, 38 L. Ed. 854, occupy a peculiar position. In *Gardner v. Collector* the only question before the court was when a particular revenue measure was signed by the President; the indorsement on the enrolled bill bearing the month and day, but not the year. The Constitution of the United States does not require that the President shall do more than sign a bill, if he approves it. It does not require him to affix the date of his approval, and under these circumstances the court held that it might examine the journals and public documents, to determine the year of the President's approval; but in concluding the opinion the court said: "We are of opin-

ion therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question." Just what is meant by this we are unable to understand; but this language is referred to in the *Jones, Duncan*, and *Lyons Cases* above. The language appears all the more ambiguous in view of the fact that in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, where the court had before it the precise question presented to us now, *viz.*, that the bill, as authenticated by the presiding officers and approved by the executive, did not contain a section which was in the bill as it passed the two houses, the court held to the strict English rule, and said: "We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of Congress, that the enrolled bill designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

But that *Gardner v. Collector* is not authority for the proposition to which it is frequently cited, and to which it is cited by relators in this case, is made plain by the same court; for when that case was cited in support of the contention that other evidence than the enrolled bill ought to be received to show that a section of the bill under consideration, as it passed the two houses, had been omitted in the enrollment, the court, in *Marshall Field & Co. v. Clark*, said: "The cause of *Gardner v. Collector*, 6 Wall. 499, was relied on in argument as supporting the contention of the appellants. The question there was as to the time when an Act of Congress took effect; the doubt, upon that point, arising from the fact that the month and day, but not the year, of the approval of the Act by the President appeared upon the enrolled act in the custody

of the Department of State. This omission, it was held, could be supplied in support of the Act from the legislative journals. It was said by the court: [The court then quotes from *Gardner v. Collector* the excerpt above given, and continues]: There was no question in that case as to the existence or terms of a statute, and the point in judgment was that the time when an admitted statute took effect, not appearing from the enrolled Act, could be shown by the legislative journals. It is scarcely necessary to say that that case does not meet the question here presented."

In *Chicot County v. Davies*, above, the court reviewed the authorities and quoted the language from *Gardner v. Collector*, above, as indicating the true rule, and then said that the courts may go back of the enrolled bill "to the legislative journals and the records and files in the office of the secretary of state"; but in *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882, the same court, after expressing regret that there had been any departure from the English rule, said: "The courts are gravitating toward the English rule, so thoroughly discussed by Mr. Justice Smith in *Chicot County v. Davies*, 40 Ark. 200; for while they say that the enrolled bill is not conclusive of the valid enactment of a law, and that we may look beyond it to the journals, they supply by presumption everything necessary to its validity, save where the journal affirmatively shows a violation of the Constitution."

In *Jones v. Hutchinson*, above, it is held that, for the purpose of determining whether the enrolled bill presented to the governor was in fact the bill which passed the two houses, the court might look to the *legislative records*; but in the latter case of *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928, 24 South. 516, the same court decided definitely that there cannot be any evidence received other than the enrolled bill and journals, and said: "Of course, the presumption is that the bill, signed by the presiding officers of the two houses and approved by the governor, is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be

justified or supported. So, here, it must be made to affirmatively appear that amendments of the house bill in question were adopted by the Senate and were not concurred in by the House, and this must be shown *by the journals* of the two houses. No other evidence is admissible." This was approved in *Jackson v. State*, 131 Ala. 21, 31 South. 380, where it is said: "To the journals only, of the two houses, which constitute the memorial of legislative proceedings, can we look to ascertain the nature, character, and extent of amendments made to a bill in the course of its passage; and, where the journals fail to disclose the nature and character of the amendments, it is not permissible to resort to other evidence for that purpose."

In *State v. Moore*, above, the supreme court of Nebraska said: "It is now settled that this court will look into the records and journals of the two houses of the legislature, to ascertain if they have complied with the constitutional provisions of the state with reference to the enactments of a law." But, as a matter of fact, there is not anything in the opinion to indicate that the court would consider evidence other than the enrolled bill and the journals; while in the later case of *State v. Abbott*, 59 Neb. 106, 80 N. W. 499, the same court said: "In this state we have not decided the enrolled bill to be conclusive, but have examined the legislative journals. In no case up to the present has the supreme court approved the reception and consideration of anything more or further than we have just stated." And a number of former cases, including *State v. Moore*, above, and *In re Granger*, 56 Neb. 260, 76 N. W. 588, are cited, and speaking of the *Granger Case*, the court continues: "In the case last cited, the consideration of other evidence than the enrolled bill and the journals was in effect disapproved."

The decision in *Supervisors v. Heenan*, above, refers for its approval to certain early cases decided in New York, but a careful reading of the opinions in those cases fails to disclose to us any justification for the Minnesota court's conclusion. Those New York cases are reviewed at length by the supreme court of California, in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, and the California court reaches the same conclusion which

we have reached with respect to the holding of the New York court; while in the later case of *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, the court seems to have definitely determined that it will not look beyond the enrolled bill and the journals. In passing, we may say that in New York state the bill which receives the signatures of the presiding officers and the governor's approval is referred to as the "engrossed" bill, and this may afford some excuse for the reference in *Supervisors v. Heenan*. The later Minnesota cases refer to the journals as evidence, but nowhere else, so far as we know, has that court ever reasserted the doctrine announced in the *Heenan Case*; while in *State v. Peterson*, 38 Minn. 143, 36 N. W. 443, where the question, arose as to whether a statute had been passed in the mode prescribed by the Constitution, the court said: "It is not questioned, in this instance, that the bill was duly enrolled, authenticated, and approved. The Act is therefore presumed to have been passed in conformity with the requirements of the Constitution, unless the contrary be made affirmatively to appear, and the proof furnished by the journals, in matters of procedure, as the reading of bills, etc., must be clear and convincing, in order to overcome this presumption."

In *Lankford v. Somerset County*, above, there is not any reference in the opinion of the court to the question now under consideration; but in a concurring opinion Mr. Justice Bryan refers to *Gardner v. Collector* as authority for the proposition that, in attempting to ascertain when a bill was delivered to the governor, the court may avail itself of any trustworthy information within its reach.

In *Hollingsworth v. Tax Collector*, above, it was held that recourse might be had to the engrossed bill, as well as the journals, to determine whether an amendment had been adopted. The case appears to have been decided principally upon the authority of *Gardner v. Collector*; but, as we have seen, the *Gardner Case* is not authority for that contention.

In *Milwaukee County v. Isenring*, above, the Wisconsin court refers, for approval of the doctrine that the original bill and

the engrossed bill may be received in evidence, to the following cases: *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Fouke v. Fleming*, 13 Md. 392; *Supervisors v. Heenan*, and the cases, above mentioned, from the supreme court of the United States. The decision by the Wisconsin court is remarkable, in this, that, instead of supporting its contention, each of the first three cases distinctly announces the contrary doctrine, and it must be that those cases were cited without reading the opinions. As we have already said, the decision by the Minnesota court is not supported by any of the authorities cited, while in *Marshall Field & Co. v. Clark* it is held that the *Gardner Case* is not authority in support of the proposition to which the Wisconsin court cited it.

With this review before us, we do not feel justified in treating the cases cited by relators as authority for the proposition for which they are contending. It is the settled rule in the supreme court of the United States, and in many of the states, that the enrolled bill is conclusive upon the courts, while in a large number of states it is held that recourse may be had to the journals, in addition to the enrolled bill; but that beyond the enrolled bill and the journals the courts will not go appears to be the rule announced in *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609; *People v. McCullough*, 210 Ill. 488, 71 N. E. 602; *Commissioners v. Armour Packing Co.*, 135 N. C. 62, 47 S. E. 411; *Portland v. Yick*, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706. In the North Carolina case just cited, the court said: "The Constitution requires that it should appear, not from the entries on the original bill, but from the journal, that the bill was properly read, and that the necessary entry of the ayes and noes was made. If the journal shows that the bill was regularly passed, no evidence will be received to contradict what is therein recorded. The law requires the journals of the general assembly to be deposited with the secretary of state (Code, sec.

2867), and these journals, or a copy of them, certified as provided by law, are the only evidence that can be resorted to in order to overcome the presumption arising from the ratification of the act, and to invalidate it. It can be done in this way, but in no other." The same rule is announced in 2 Wigmore on Evidence, section 1550, and in 1 Lewis' Sutherland on Statutory Construction, section 47.

In *Palatine Ins. Co. v. Northern Pacific Ry. Co.*, 34 Mont. 268. 85 Pac. 1032, this court departed from the rule theretofore announced in *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645, and held that the courts might consult the legislative journals to determine whether, upon the final passage of a bill in either house, the names of those voting had been entered on the journal. We felt constrained to go to that extent because of the language of section 24, Article V, of our Constitution, which provides: "No bill shall become a law * * * unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal." Section 12, Article V, of our Constitution, requires that each house shall keep a journal of its proceedings; but, except in those instances where the Constitution requires a specific entry to be made in the journals, the question what entries shall be made, or how full or minute the entries made shall be, are questions addressed to the legislative discretion. (*State v. City of Hastings*, 24 Minn. 82.)

There are but two instances mentioned in our Constitution wherein the legislature is required to make any particular entries in the journals. The first is found in section 24 above, and the other in section 27 of the same Article, where the fact of the signing of a bill by the presiding officer is required to be entered upon the journal. But for the failure of this second entry to be made, there is not any declaration that any consequences would follow; whereas, there is the specific declaration made in section 24 that, if the names of those voting upon the final passage of a measure be not entered in the journal, the bill shall not become a law. But for the obligatory character of this language, this

court, in the *Palatine Case*, above, would have followed the rule theretofore announced in *State ex rel. Bray v. Long*.

In most of the cases which depart from the strict English rule, it is said that the courts look beyond the enrolled bill to the journals, only because of the fact that the particular Constitution contains a provision similar to that in our section 24 above. The rule as to the extent to which those courts will go in consulting the journals is not altogether uniform; but we do not hesitate to say that a due respect for a co-ordinate branch of government compels the court to accept the enrolled bill, bearing the signatures of the presiding officers of the two houses and the approval of the governor, as conclusive, except in the one instance where the Constitution has declared that a failure to enter the names of those voting upon the final passage of the bill will prevent the bill becoming a law.

Original or engrossed bills are not authenticated in any manner. Indeed, when an original bill is amended, its functions cease. The engrossed copy takes its place, and when an engrossed copy is acted upon by the house, or the two houses, it becomes *functus officio*. If it is defeated, it becomes a dead letter. If it is passed, the enrolled copy takes its place and receives due authentication. It is true that section 76, Revised Codes, requires the secretary of the Senate and the clerk of the House, at the close of each legislative session, to deliver to the secretary of state "all bills and papers belonging to the archives of their respective houses"; but just what is meant to be included in the phrase "all bills and papers" is not clear. In any event, we think it would be extremely dangerous to impeach a duly authenticated record—an enrolled bill—by papers which are not authenticated or identified in any manner. This does not apply to the journals, for they are required to be authenticated. (Revised Codes, sec. 70.) We deem the argument advanced in *Marshall Field & Co. v. Clark*, above, in favor of the English rule, conclusive upon this subject, excepting in so far as that rule is modified or added to by the provisions of section 24 of our Constitution, above.

This conclusion disposes of the contentions made by relators, unless the Act upon its face is so defective or uncertain that its provisions cannot be carried into effect. The only serious defect in the bill, if such it may be called, is its failure to provide any compensation for the county superintendent of schools; but, whatever effect this may have upon the government of the county after it is organized, we do not think that it is sufficient to defeat the purposes of the bill. The Act appears to be sufficient to designate the boundaries of the proposed county and to provide for its organization and government.

The proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

DREELAND, RESPONDENT, v. PASCOE, APPELLANT.

(No. 2,677.)

(Submitted June 12, 1909. Decided June 21, 1909.)

[102 Pac. 331.]

Trusts—Enforcement—Complaint—Counterclaims—Burden of Proof—Contract of Employment—Brokers—Evidence.

Evidence—Erroneous Admission—Harmless Error.

1. Error in permitting plaintiff to testify as to what he meant by a letter written by him to defendant and introduced in evidence, was harmless, where the witness was unable to say what he meant and where his statement was more to his prejudice than to his advantage.

Trusts—Enforcement—Complaint.

2. A complaint which alleged that plaintiff and defendant were co-owners in a mining claim; that defendant sold the property and received therefor as part compensation 5,000 shares of the capital stock of a certain company; that a certificate calling for the entire 5,000 shares had been issued to defendant who had refused to transfer to plaintiff the number of shares belonging to him, stated a cause of action for the enforcement of a trust in the stock.

Same—Counterclaims—Burden of Proof.

3. Where, in a suit to enforce a trust in corporate stock, defendant admitted the allegations of the complaint, save that plaintiff was en-

titled to the stock, and urged as a defense a counterclaim constituting a lien on the stock, defendant had the burden of proof.

Brokers—Contract of Employment—Evidence.

4. Evidence held not to show that a letter, upon which defendant based his claim that a contract of employment had been entered into between himself and plaintiff whereby he was to sell a mining claim for a stipulated sum, did not bear the construction placed upon it by defendant.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by John Dreeland against George Pascoe. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Mr. L. P. Forestell, for Appellant.

The complaint fails to state facts sufficient to constitute a cause of action in claim and delivery. It is not alleged that defendant wrongfully detained the property from him at the time of the commencement of the action; nor that at that time he was entitled to the possession of the property. (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302, 303, and cases cited.) Neither does it state a cause of action in conversion. It does not state that the defendant converted the stock, or that plaintiff was entitled to its possession at the time of any alleged conversion. (*Glass v. Min. Co.*, *supra*; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413, 414; *Shinn on Replevin*, secs. 428, 441, 443 and cases cited; *Raymond v. Blanchgrass*, 36 Mont. 449, 93 Pac. 648, 650, 15 L. R. A. (n. s.) 976; *Balch v. Jones*, 61 Cal. 234-236.) "The rule of law that indivisible personal property owned by two or more joint tenants or tenants in common cannot be replevied by one or more of such owners from the other or others is quite uniform, and almost without exception." (*Hill v. Seager*, 3 Utah, 379, 3 Pac. 545, 11 Ency. of Pl. & Pr. 762, 765; 30 Cyc. 193.) There is no allegation sufficient to maintain partition. There is nothing to show whether plaintiff's interest in the certificate is divided or undivided.

The decision of the court does not support the judgment, and a failure to find upon a material issue is ground for a new trial.

(Spelling on New Trial and Appellate Practice, sec. 592; *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75; *Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689; *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224.) The question may also be presented upon an appeal from the judgment. (*Id.*)

Messrs. Kirk & Kirk, for Respondent.

This is plainly an action to enforce a trust arising out of defendant's inequitable conduct. Defendant, when he sold the claim and received consideration, a part of which belonged to defendant, became his trustee and bound to account to him therefor. (Revised Codes, secs. 5365, 5372.) Trusts of personality will be enforced by a court of equity. (*Kimball et al. v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621; 3 Pomeroy's Equity Jurisprudence, sec. 1045; 6 *Id.*, sec. 749; 4 *Id.*, sec. 1402; see, also, *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.)

The court's finding is a general one for plaintiff, and as such is ample and sufficient. No request was made for findings by the defendant, and, therefore, none were necessary, and the court's failure to make specific findings is not a ground for reversal. (Revised Codes, sec. 6766; *Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447; *Yellowstone Bank v. Gagnon*, 25 Mont. 271, 64 Pac. 664.)

MR. JUSTICE SMITH delivered the opinion of the court.

This cause was tried to the district court without a jury. The court entered judgment in favor of the plaintiff, in accordance with the prayer of the complaint, and from that judgment, and an order denying a new trial, the defendant has appealed.

The complaint alleges: "(1) That plaintiff and defendant were co-owners of the Col. Sellers lode claim in the following proportions, to-wit, plaintiff owning a three-fourths interest, and the defendant a one-fourth interest; (2) that on or about the eleventh day of April, 1906, defendant, for himself, and

as attorney in fact of plaintiff, sold said mining claim to the Butte-Milwaukee Copper Company, receiving as part of the compensation therefor 5,000 shares of the capital stock of said company, to be taken by said owners according to their respective interests in said mine; (3) that a certificate calling for the entire 5,000 shares of stock was issued to said defendant; (4) that plaintiff is the owner of and entitled to the transfer to him of 3,750 shares of said stock; (5) that on or about the fourth day of April, 1907, plaintiff demanded of defendant the transfer to him of said stock, but that defendant refused, and still refuses, so to do. Wherefore plaintiff prays judgment and decree of this court that plaintiff be adjudged and decreed to be the owner of three-fourths of said stock represented by said certificate, and that defendant be declared trustee of the plaintiff for said stock and be directed to cause said stock to be transferred to said plaintiff."

The answer admits the allegations of paragraphs 1, 2, 3, and 5 of the complaint, and denies the matters set forth in paragraph 4 thereof. The defendant then proceeds to allege affirmatively, and as a counterclaim to plaintiff's cause of action: "That heretofore, to-wit, on or about the eleventh day of April, 1906, plaintiff and defendant made and entered into a certain agreement, wherein and whereby plaintiff made, constituted, and appointed defendant his agent for the purpose of selling plaintiff's interest in the said Col. Sellers lode claim, and wherein and whereby it was agreed that plaintiff should pay to defendant, as compensation for his services in selling the said interest of said plaintiff in said claim, five per cent of the purchase price for said interest of plaintiff, together with the sum of \$100 in addition thereto, for expenses; that thereafter, on or about the said eleventh day of April, 1906, defendant succeeded in selling said interest of plaintiff in said claim, for the sum of \$30,000, of which said sum \$26,250 was paid in cash to plaintiff, and the balance was paid in stock of the Butte-Milwaukee Copper Company, to-wit, 3,750 shares of the stock of said company, which said stock is now in possession of this defendant; that defendant

has fully completed and performed all of the terms and conditions of said agreement by him to be performed; that, under and by virtue of the said agreement, there became due and owing from plaintiff to defendant for said services five per cent of said sum of \$30,000, and, in addition thereto, the sum of \$100, for expenses, amounting in all to the sum of \$1,600, no part of which has ever been paid to defendant by plaintiff, save and except the sum of \$50; that defendant now has in his possession, as part of the purchase price of the interest of plaintiff in the said mining claim, the said 3,750 shares of the capital stock of the Butte-Milwaukee Copper Company; that said defendant claims a lien upon said stock as security for the payment of said commission and compensation, agreed upon between plaintiff and defendant and due him as aforesaid, for his said services; and that said defendant is now holding the said 3,750 shares of stock under and by virtue of his said lien."

The plaintiff by replication denied that he agreed to pay any sum whatsoever for such services. He admits, however, that he paid the defendant \$50, which he says was "simply in appreciation of services rendered by defendant, and not in compliance with, or in recognition of, any alleged agreement or contract between them."

The defendant testified as follows: "There was an agreement as to my selling this claim. That agreement is in the form of a business letter, in several letters." Defendant then introduced in evidence the following letter:

"Moyie, April 18, 1906.

"Geo. Pascoe, Esq., Butte, Mont.

"Dear George: I received your letters and note of agreement last evening and would say you done remarkable well so far with ground. With regards money, if you pay one-half to family and five per cent. to you I guess I would come out about even. Pay money into Davis' bank to my credit and deduct one hundred dollars from same for your expenses. I think that is about square; if not, you can let me know. For the stock business, I hope I will get over to Butte before that time arrives.

I assure you the family will get their portion of any money paid. I am pleased with things if you are. I remain,

“Sincerely yours,

“JOHN DREELAND.”

The defendant also testified: “I looked after Mr. Dreeland’s interest in this mining claim and paid the taxes every year, and I made deals here. I made a sale of the property to the Butte & Milwaukee for \$35,000 and 5,000 shares of the stock. I deposited Mr. Dreeland’s money in the bank. The last payment was credited to his wife and himself. The first \$5,000 he was here when it was paid. The check was drawn by me, and we both went to the bank, and Mr. Dreeland got his \$3,750, and I got the rest of the \$5,000. Mr. Dreeland received the three-fourths of the purchase price. The stock was made out in my name because Mr. Dreeland, in the first place, would not take any stock, and I said I would take it, and it was deposited in the bank in my name. Then afterward Mr. Dreeland said he would share with me in the stock. Mr. Dreeland paid me \$50 of the money which is referred to in this letter of the 18th of April. That was paid to pay part of the expenses. There has been no part of the five per cent paid to me on that. I paid \$9.89 in taxes on this property. As to the general character of the work which I did, I attended to working up this deal, and I went to Walkerville several times to get papers signed, and I sent them to Mr. Dreeland. When I gave Mr. Dreeland his certificate of \$22,500, I said: ‘There is 5,000 shares of stock here in my name. What are you going to do with that?’ And he said, ‘Three-fourths belongs to me and one-fourth to you.’ and I said, ‘John, there is some consideration about this thing,’ and he said, ‘That is all there is about it.’ I have no claim on this stock except my five per cent. Mr. Dreeland and I had been the owners of the Col. Sellers lode claim for seventeen or eighteen years. My other expenses were about \$4.50. The last payment was a straight \$30,000 payment. I signed the check and told them to place to Mr. Dreeland’s credit his proportion, \$22,500, and the \$7,500 I took myself. I told them to place Mr.

Dreeland's portion to the credit of Mr. and Mrs. Dreeland. I base my claim to this commission upon this letter of April 18. I understood from that letter that I was to hold out five per cent and \$100 for expenses besides. John volunteered that himself. I never charged him anything. I don't think I said anything about five per cent in the letter I wrote him which called for this answer. I know I mentioned about his wife; but I don't think I said he ought to pay me five per cent for making this deal. I will say positively that I did not ask for five per cent. I did not ask him for a cent. I did not say I ought to get five per cent."

The plaintiff was sworn in his own behalf, and was asked what he meant by the letter of April 18. This question was objected to, and the court overruled the objection. The defendant excepted to the ruling of the court, and now assigns the same as error; but we are unable to conclude that any error was committed in this regard, for the reason that Dreeland was unable to say what he meant by the letter. He made a long, rambling, involved statement, which was more to his prejudice than to his advantage. He did testify, however, categorically that the defendant wrote him a letter in which he asked for five per cent of the purchase price, and that the letter of April 18 was in answer to this demand. It appears from the testimony that the defendant was somewhat solicitous in behalf of plaintiff's wife; he fearing that she would not get any part of the purchase price of the Dreeland interest in the mine. Plaintiff also testified that, when he paid the \$50 to defendant, the latter said it was more than satisfactory.

The judge of the district court filed the following written decision, which may be construed as the findings of fact and conclusions of law in the case, in view of the fact that no demand was made for any more definite findings: "In this action heretofore tried by the court, the court finds for the plaintiff, and concludes therefrom that he is entitled to recover from defendant as prayed in the complaint. I am of the opinion the remark in plaintiff's letter which defendant claims amounts to a promise

to pay him (defendant) a five per cent commission on the sale price of plaintiff's interest in the claim owned by them in common was called forth by a request therefor in some prior letter of defendant's, and is intended as an ironical or sarcastic reply thereto, and not as a promise to pay five per cent. It is immediately followed by an express direction as to the deposit of the money, an express allowance for expenses, and an assurance that plaintiff will himself discharge his obligations to his family. The remark relied on is only hypothetical at most, and alone, or in connection with the context, imports no promise or offer. Geo. M. Bourquin, Judge."

The first contention of the defendant is that the complaint does not state facts sufficient to constitute a cause of action. We think there is no merit in this contention. It is based upon the hypothesis that the action is either in claim and delivery, or in conversion, or for partition of the certificate of stock. It is quite clear to us that the action is brought to enforce a trust in the stock, and this appears to have been the theory upon which the action was tried in the court below. (See *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497.) The objection that the complaint does not state a cause of action is urged in this court for the first time and is not well taken.

At the trial the plaintiff waived any objection that the matters pleaded in the answer were not a proper subject of counterclaim, so that question is not before us.

The second assignment of error is to the effect that the court erred in holding that the burden of proof was on the defendant. We think the burden was on the defendant. He admitted all the allegations of the complaint, save that the plaintiff was entitled to receive the stock, and urged as a defense to the action his counterclaim for \$1,550, the amount of which he maintained was a lien upon the stock. Under these circumstances, we think the burden of proof was upon him; but, at any rate, as the cause was one in equity and was tried to the court sitting without a jury, there could be, probably, no prejudice to the defendant if the court erred in this ruling.

The district court was of opinion that the language employed by the plaintiff in his letter of April 18, was a bit of sarcasm on his part. The court saw the witness upon the stand, and may have been justified in this conclusion; but, however that may be, in directing judgment for the plaintiff, the presumption is that the court found that his version of the transaction was correct. We have carefully considered the letter of April 18, and find therein nothing which would have warranted the district court in holding that there was a contract between these parties. The defendant says positively that he bases his claim of contract upon the language employed in this letter. In view of all of the facts disclosed by the record, including the conduct of the parties after April 18, we are inclined to doubt whether the defendant considered that any contract existed between them. The claim of contract appears to have been an afterthought. The parties had been associated together for seventeen or eighteen years in the ownership of the Col. Sellers lode. Defendant was interested in the disposition of the same; and, aside from his present contention, there is nothing in his testimony to show that he intended to claim anything for his services prior to the time when plaintiff demanded his share of the stock.

We hold that there was no contract between the parties, and the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

HARRINGTON, RESPONDENT, v. BUTTE, ANACONDA & PACIFIC RY. CO., APPELLANT.

(No. 2,663.)

(Submitted June 14, 1909. Decided June 22, 1909.)

[102 Pac. 330.]

Personal Injuries—Railway Crossings—Parent and Child—Conflicting Evidence—Findings—Conclusiveness.

Personal Injuries—Conflicting Evidence—Findings of Jury—Conclusiveness.

1. Where, in an action against a railway company to recover for personal injuries to plaintiff's minor child, the evidence whether the infant ran in front of the moving cars so as to render the injury unavoidable, or whether the defendant's employees were negligent, was conflicting, the jury's finding thereon will not be disturbed on appeal.

Same—Railway Crossings—Parent and Child.

2. Evidence that the parents of a minor child injured at a railway crossing, exercised due care of the child, held sufficient to go to the jury.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

PERSONAL INJURY action by Jeremiah P. Harrington against the Butte, Anaconda and Pacific Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Mr. C. F. Kelley, Messrs. Forbis & Evans, and Mr. D. Gay Stivers, for Appellant.

Mr. John J. McHatton, Mr. Peter Breen, and Mr. S. T. Hoggvoll, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was heretofore before this court (*Harrington v. Butte, Anaconda & Pacific Ry. Co.*, 37 Mont. 169, 95 Pac. 8, 16 L. R. A., n. s., 395), and a sufficient statement may be obtained by reference to the opinion then rendered. After the case was

remanded, it was again tried in the district court, before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff for \$7,500. A motion for a new trial was made, and upon the hearing of this motion the court ordered the plaintiff to remit \$3,500 from the amount of the verdict or submit to a new trial. A written consent to such reduction was filed by counsel for plaintiff, and the motion was denied. The defendant has appealed from the judgment and from the order denying it a new trial. In this court counsel for appellant argue two propositions only.

1. It is said: "The evidence does not support the verdict. There was no evidence of negligence on part of defendant." There is evidence tending to show: That, at the time of this accident, an engine crew and switching crew in the employ of the defendant railway company were handling some cars at a point where the company's tracks cross North Wyoming street, in Butte; that one box-car and two flat cars were pushed across the street to the west; that the engine and other cars then moved away and took a siding; that the box-car was farthest west and farthest from the street crossing; that the brakeman in charge of these three cars was at the brake on the west end of the box-car; that, after the engine and cars cleared the track and the switches were adjusted, this brakeman released the brake and permitted these three cars to drift back over the street crossing; that, in coming back, the first flat car and half of the second ran over Bernard Harrington, injuring him. Of these facts there is not any dispute apparently. Witnesses for the plaintiff testified: That the three cars stood west of Wyoming street from three to five minutes; that Bernard Harrington came upon the street crossing of this track soon after the cars were pushed west of the street; that he stood on the track from two to four minutes; that a signal was not given before the cars moved backward over the street and upon the child; that the railway company did not have a watchman at the street crossing; and that there was not any brakeman or other employee of the company on the first flat car or in a position to keep a lookout. The

evidence shows that the cars moved very slowly in coming back over the street, not exceeding two or three miles per hour, and probably slower; that, if a man had been upon the first flat car, he could have seen the boy on the track, and, if the air-brake apparatus was working smoothly, he could have reached down, turned the angle cock, set the brake, and stopped the cars in two feet, and that, too, without leaving the car; that the child was at least ten or fifteen feet from the nearest car when the brake was released. And one witness, an experienced brakeman, testified that he could have jumped from the first flat car and removed the child, with safety to himself. With respect to many of these latter facts there is a sharp conflict in the evidence.

Upon the former appeal the same contention was made as that now under consideration, and, while the evidence introduced upon this last trial is not just the same as the evidence which we reviewed upon the former appeal, in its general character it is the same, and our observations made upon the former appeal are alike applicable here. We said: "Appellant contends that the injury was the result of unavoidable accident, and while there is some testimony to the effect that the child ran upon the track and in front of the moving cars so soon before his injury as to render the injury unavoidable, there is likewise testimony that the child stood upon the track for from two to four or five minutes before he was struck. This conflict in the evidence was properly submitted to the jury for consideration, and with the finding thereon in plaintiff's favor we cannot interfere."

2. The following is the other assignment argued: "The evidence is not sufficient to show that plaintiff was not guilty of negligence in permitting the boy to be upon the railroad crossing." Upon the former appeal we held that the unexplained presence of a child *non sui juris*, unattended in a known place of danger, is *prima facie* evidence of the parents' negligence. Upon this last trial the parents of the child testified as to the care exercised by them with respect to this child. Four or five of their near neighbors also testified as to their observations of the parents' care of the child. Of course, from the very nature

of the case, the evidence must have been and was of a general character; but we think it was amply sufficient to go to the jury.

Upon these two propositions, which are the only ones presented, we do not discover any error.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

LEGGAT, ADMINISTRATOR, ETC., RESPONDENT, v. PALMER, APPELLANT.

(No. 2,664.)

(Submitted June 12, 1909. Decided June 22, 1909.)

[102 Pac. 327.]

Interest—Deposit—Principal and Surety—Evidence—Pleadings—Amendments During Trial—Complaint—Prayer, No Part of.

Principal and Surety—Deposit—Interest—Evidence.

1. Where, in an action for interest on a sum deposited in a bank to indemnify defendants against loss as sureties on a *supersedeas* bond, it appeared that a smelting company was indebted to plaintiff, that the sum so due was deposited to the credit of defendants to be held by them until exonerated from liability under the bond, and that the liability was discharged, evidence that neither the company nor its receiver ever claimed any interest on the deposit was admissible as confirmatory of plaintiff's title to the amount on deposit and the interest accruing thereon.

Pleadings—Amendments During Trial.

2. Amendments during trial, to pleadings which do not change the nature of the action or mislead the adversary party to his prejudice are proper.

Complaint—Prayer, No Part of—Amendments—Judgment.

3. The prayer is no part of the complaint and cannot be looked to to find support for the judgment; hence, the allowance of an amendment to the prayer asking for a larger sum than could be found due under the allegations of the complaint, did not authorize judgment for the greater amount.

Principal and Surety—Deposit—Pledge—Interest.

4. A deposit in a bank to indemnify sureties on a bond against possible loss is a pledge within the definition of section 5774, Revised Codes; title to it, as between the principal and the sureties, is in the former, and any interest accruing thereon belongs to him and not to the sureties.

Same.

5. Section 6046, Revised Codes, providing that acceptance of payment of the principal waives all claim to interest, has no application to moneys deposited to indemnify sureties on a bond against loss.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Alexander Leggat, administrator of John A. Leggat, deceased, against C. H. Palmer and another. From a judgment for plaintiff, defendant C. H. Palmer appeals. Modified and affirmed.

Mr. Chas. B. Leonard, and Mr. Chas. A. Ruggles, for Appellant.

It is universally the law that even in the liberal Code states, the rule allowing amendments to pleadings does not go so far as to allow the party to discard the cause of action with which he commenced his proceedings, and to substitute a new and different cause of action. It is held that the court may, at the trial, or before the case is submitted, allow an amendment to conform the pleading to the fact, if no substantial change in the claim or defense is worked thereby. (*Wormall v. Reins*, 1 Mont. 627; *Hershfield v. Aiken*, 3 Mont. 443; *Ramsey v. Cortland Cattle Co.*, 6 Mont. 499, 13 Pac. 247; *Williston v. Camp*, 9 Mont. 89, 22 Pac. 501; see, also, *Ford v. Ford*, 53 Barb. 525.) The point is exhaustively discussed in a note to the case of *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec., at p. 158.

Parties in the position of the defendants, holding the money as mere stakeholders are not liable for such interest as they received on the fund. (*Jones v. Mallory*, 22 Conn. 386; see, also, *Williams v. Baxter*, Fed. Cas. No. 17,715, 3 McLean, 471.)

In *Ruckman v. Pitcher*, 13 Barb. 556, it was held that while money paid to a stakeholder does not draw interest, interest may be recovered from the commencement of the suit as damages for its detention.

Under section 6046, Revised Codes, interest was waived. (*Valentine v. Donohue-Kelly Bank*, 133 Cal. 194, 65 Pac. 381; *City of Los Angeles v. City Bank*, 100 Cal. 22, 34 Pac. 510.)

Messrs. Kirk, Bourquin & Kirk, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff, as administrator of the estate of John A. Leggat, deceased, to recover moneys alleged to have been received by defendants as interest upon the sum of \$4,000, deposited with them by the said Leggat during his lifetime, to indemnify them against loss as his sureties upon a *superseas* bond. The purpose of the bond was to secure a stay of execution upon a judgment for the plaintiff on the first of the several appeals in the case of *Harrington v. Butte & Boston Min. Co. et al.*, upon the last of which a judgment in favor of plaintiff was affirmed by this court on June 24, 1907. (35 Mont. 530, 90 Pac. 748.) This judgment was afterward paid by the plaintiff herein. An understanding of the controversy involved in that case may be had by reference to the statement preceding the opinion reported in 19 Mont. 411, 48 Pac. 758. The first appeal in the case was taken on December 12, 1895. At that time the Butte & Boston Mining Company was indebted to its codefendant, John A. Leggat, on account of ores sold and delivered to it by him, to an amount in excess of \$4,000. The defendants herein, being officers of the company, became sureties on the *superseas* bond. In order that they might be secured against loss in case the judgment should be affirmed, and also that the company might be secured against any contingent liability on any judgment finally recovered in the action, it was agreed by Leggat that \$4,000 of the amount due him from the company should be deposited by it in the State Savings Bank, at Butte, to the credit of the defendants, and be held by them until the termination of the controversy. The arrangement was completed by a deposit of the amount in the bank, and the issuance by it of a certificate to the defendants jointly, bearing interest at the rate of four per cent per annum. There was no stipulation in the agreement requiring the defendants to put the money at interest, or as to what disposition should be made

of any interest received. The amount due from the company to Leggat, in excess of \$4,000, was then paid to him by the company, and his account upon its books was closed. Though the judgment was reversed on April 26, 1897, and the defendants were exonerated from liability, they retained the deposit intact under the original arrangement, until March 10, 1898. On that date, by consent of the receiver of the company, the defendants paid to Leggat \$400, retaining the balance on deposit as before. Leggat died on October 12, 1903. By consent of the receiver of the company, the plaintiff having furnished him other satisfactory indemnity, the defendants made payments to plaintiff, as follows: On November 28, 1903, \$500, on January 27, 1904, \$1,850, and on May 3, 1904, \$1,250. A demand was made upon the defendants for the interest, but the demand was refused. Hence this action.

The complaint alleges that the defendants held the money on deposit from July 27, 1897, and continued to receive interest thereon at the rate of four per cent per annum from that date until March 10, 1898, when the payment of \$400 was made to Leggat, and that from that date until November 28, 1903, they continued to receive interest at the same rate upon the balance of \$3,600, and judgment is demanded for \$924.30. The cause was submitted to the court without a jury. Judgment was rendered for plaintiff for \$1,209.17. Defendant Palmer has appealed from the judgment and an order denying his motion for a new trial.

1. Though a considerable portion of appellant's brief is devoted to a discussion of rulings of the court upon the admissibility of certain items of evidence, we do not think any of the contentions in this behalf of sufficient merit to demand special notice. We find no error in any of them. For illustration: The witness Forbis, who was attorney for the company at the time the deposit was made, and afterward its receiver, and who had personal knowledge of the account of Leggat and the arrangement for indemnity against loss on the bond, was permitted to state, in substance, that neither the company, nor he as its re-

ceiver, ever made any claim to interest accruing on the deposit. It is said that it was wholly immaterial whether any such claim was made or not. While the evidence was not of a great substantial value, yet, in view of the testimony already given by the witness, tending clearly to establish the fact that the deposit was regarded by all the parties as a payment to Leggat of the balance due on his account, subject only to the lien of the company and the defendants for their indemnity, the omission of any such claim by the company or the receiver was confirmatory of Leggat's title to the amount of the deposit, and hence to the interest accruing thereon.

2. The plaintiff was permitted to testify that he had learned, during the course of the trial, that the defendants had received interest on the deposit from December 12, 1895, instead of July 27, 1897, as alleged in the complaint, and that upon a calculation of the interest from the former date he had found that the amount received by them was \$1,209.17. This evidence was objected to as immaterial and irrelevant, because it had reference to a claim without the issues made by the pleadings. The objection was overruled. Thereupon counsel for plaintiff asked leave to amend the prayer of the complaint by inserting therein this latter amount, instead of \$924.30. Counsel stated: "We are willing that this application should be submitted to the court when we submit the case." Objection was made by the defendants that nothing appeared to justify the amendment, and that, in any event, the evidence having been admitted over objection, the court could not permit the amendment in order to make the complaint conform to the proof. The court overruled the objection; but, so far as the record shows, the amendment was never made, though judgment was rendered for the larger amount. Invoking the rule that an amendment will in no case be permitted in order to make the pleadings conform to the proof, when the evidence tending to establish the matter with reference to which the amendment is sought has been admitted over objection (*Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399), counsel contend that the amendment should not have been

allowed. Under the statute, to allow amendments is the rule; to deny them is the exception. The rule observed by this court has always been to allow them with great liberality, where they do not change the nature of the action, or mislead the adversary party to his prejudice; its application going even to the extent of permitting them after verdict and judgment. (*Wormall v. Reins*, 1 Mont. 627; *Hershfield & Bro. v. Aiken*, 3 Mont. 442; *Williston v. Camp*, 9 Mont. 88, 22 Pac. 501; *Merrill v. Müller*, 28 Mont. 134, 72 Pac. 423; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609.) From the record before us, however, it does not appear that any amendment was in fact made. The court seems to have granted leave to amend the demand for judgment, and to have assumed, in rendering judgment, that the amendment had been made. This in no wise changed the allegations of the complaint, to which alone we may look to see whether the judgment rendered is the proper one. The prayer is no part of the pleading, and cannot be looked to to find support for the judgment. Therefore, accepting the rule contended for by appellant as correct, it cannot aid him, because it has no application. The particular wherein the court erred was that it assumed that an amendment to the prayer would authorize judgment for a sum greater than could be found due under the allegations of the complaint. Even though, if the application had been to amend the complaint by substituting the earlier date instead of one alleged to fix the amount of the recovery, we might otherwise have presumed that the amendment had actually been made, yet, in view of the statement made by counsel, and the silence of the record as to any action by the court thereon afterward, we may not indulge any presumption on the subject. Judgment should have been rendered for the amount due under the allegations of the complaint. To the extent, then, that the judgment exceeds the amount justified by the allegations of the complaint, it is erroneous.

3. Counsel argue that it may be conceded that the money, when deposited to the credit of the defendants, belonged to John A. Leggat, yet, since it appeared from the evidence that it was

returned to him, or to plaintiff, his representative, as soon as he had a right to its return, and demand was made for it, the finding in favor of plaintiff is erroneous. In support of this argument they cite section 5140, Revised Codes, which provides: "A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time." It is said that under this provision the defendants may not be charged with interest, except upon proof of a demand for a return of the principal sum of the deposit, and a refusal to return it, and then only from the date of the demand. The provision has no application. It refers only to the obligation resting upon the depositary to deliver. The deposit here was a pledge within the definition laid down in section 5774, Revised Codes. The money was by agreement deposited with the defendants, or, what amounts to the same thing, with the bank to their credit, to be held until judgment against Leggat and the company was reversed, and until the company was finally discharged from liability. Neither Leggat nor his representative had a right to demand a return of it until the end of the litigation, and the company was discharged by payment by Leggat of any judgment against him. In the meantime the defendants were not only not obliged to invest the deposit profitably, but they were not entitled to do so. If they had undertaken to withdraw it from the bank, and so invest it, they would have assumed the risk of its safekeeping. Their whole duty would have been discharged if they had made a special deposit of it, or, in the absence of a stipulation that it should be deposited in the bank, by locking it up in a safety vault. Since it was a pledge, the title to it, as between defendants and Leggat, was in Leggat, and not in them, and the accretions or profits, if any, belonged to him as the owner, and not to them. (Revised Codes, sec. 4472.) In 31 Cyc., at page 825, the rule applicable is stated thus: "The pledgee must account to the pledgor for all the income, profits, and advantages derived by him from the pledged property. Such profits or income should be applied, first to the payment of the interest on the debt, then to the principal, and any surplus

remaining from such profits, income, or advantages so derived by the pledgee from the pledged property is held for the pledgor." So the rule is declared by the authorities generally. (Story on Bailments, sec. 331; Schouler on Bailments and Carriers, 3d ed., sec. 212; *Houton v. Holliday*, 6 N. C. 111, 5 Am. Dec. 522; *Hunsaker v. Sturgis*, 29 Cal. 142; *Geron v. Geron*, 15 Ala. 558, 50 Am. Dec. 143; *Gilson v. Martin*, 49 Vt. 474.)

Finally it is said that, since it appears from the evidence that the plaintiff received at different times the principal sum of the deposit as such, he waived the payment of interest. Section 6046 of the Revised Codes is cited in support of this contention. There would be merit in the contention were it shown by the evidence that the defendants occupied the position of simple debtors for the amount of the deposit. The evidence does not justify any such inference.

The order denying a new trial is affirmed. The cause is remanded to the district court, with direction to modify the judgment by striking out so much thereof as is in excess of \$924.30, and, when so modified, it will stand affirmed.

Modified and affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

39	310
40	640

HOSTY, APPELLANT, v. MOULTON WATER CO. ET AL., RESPONDENTS.

(No. 2,681.)

(Submitted June 15, 1909. Decided June 28, 1909.)

[102 Pac. 568.]

Personal Injuries—Complaint—Uncertainty—Nature of Injuries—Demurrer—Women—Miscarriage—“Injured Feelings”—Not Element of Damage.

Personal Injuries—Complaint—Uncertainty—Nature of Injuries—Demurrer.

1. A special demurrer to the complaint in a personal injury action, which alleged that by reason of defendant city water company's negligence in shutting off the water from a tank connected with plaintiff's stove without her knowledge, an explosion occurred, and plaintiff was so injured and mentally disturbed thereby that being with child, she lost the same, and became very sick, and on account thereof suffered great pain and injury, etc., was properly sustained. It was impossible to tell from the pleading whether the grievances complained of were the result of physical injury and mental disturbance, or of mental disturbance alone.

Same—Women—Miscarriage—“Injured Feelings”—Not Element of Damage.

2. While a woman who suffers a miscarriage as a result of physical injury may recover for any mental or physical suffering attendant upon the miscarriage, injured feelings following the miscarriage, not a part of the pain naturally attending it, are too remote to be considered an element of damage.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Catherine Hosty against the Moulton Water Company and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

Messrs. Breen & Hogevoll, for Appellant.

Messrs. Forbis & Evans, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action reads, in part, as follows: “That on or about the first day of July, 1908, the said corporations and

the said Carroll was the master and the said Miles was the servant of the said masters, and was on the said date employed by them for the purpose, among other things, to shut off water. That the said defendants are operating a water plant in Walkerville, county of Silver Bow, state of Montana, where the plaintiff resided on said date. The said defendants had on the said date connected their water plant with a certain tank in the kitchen of this plaintiff, which said water-tank was then and there to the knowledge of all of the said defendants connected with a certain stove then used by this plaintiff, among other things, for the purpose of heating water. That the said defendants either knew, or by the exercise of ordinary care ought to have known, that by shutting off the water that came into the said tank from their reservoir the said water would be converted into steam and would be likely to explode in the said steam and injure this plaintiff or other persons that might be near. That, notwithstanding such facts, the said defendants by their agent or servant or foreman, the said Henry Miles, caused the water to be shut off in the pipes that connected their said reservoir with the said tank, and no one notified this plaintiff at all, and the plaintiff did not know that the water was shut off. By reason of want of notice, and by reason of the said shutting off of the water, the said tank exploded and thereby so injured and mentally disturbed this plaintiff that she, being then and there pregnant with child, lost the same, she became very sick, and has on account thereof suffered great pain and injury, all to her damage in the sum of \$25,000. No part thereof has ever been paid."

The defendants filed a general demurrer to the complaint and also a special demurrer. The grounds of the latter were: "(2) The said complaint is uncertain in the following particulars: (a) It is not certain, and cannot be ascertained from the allegations of said complaint, whether the injuries complained of were the result of physical injury or mental suffering and disturbance, or both. (b) That the extent or character of plaintiff's physical injury, if any, is not stated. (c) That the extent

or character of mental disturbance is not stated, in that it is not shown or alleged how the same occurred, whether from sound, the flowing of water, or escape of steam, or other causes; neither is it alleged or shown in what proximity was the plaintiff to the boiler when it exploded. (d) It is not shown or alleged when the sickness or injuries complained of occurred with reference to the time of explosion, and therefore not shown whether the same resulted from the explosion. (3) The said complaint is ambiguous for the same reasons assigned for its uncertainty. (4) The said complaint is unintelligible for the same reasons assigned for its uncertainty." The court sustained the demurrers, whereupon plaintiff announced that she did not care to amend and would stand upon her demurrer (complaint). The court then ordered judgment against the plaintiff "upon the merits" and entered a judgment dismissing the complaint, with costs to the defendants. Plaintiff appeals from the judgment.

The special demurrer was properly sustained. It is impossible to tell from the complaint whether the grievances complained of were the result of physical injury and mental disturbance, or of mental disturbance alone. If we should hold that there is no allegation of physical injury, and that therefore no cause of action is stated, the plaintiff might well claim that the complaint does allege physical injuries, and therefore states a cause of action regardless of the allegation of mental disturbance. On the other hand, if we should hold that the complaint alleges physical injuries, then the question whether plaintiff can recover for the results of mental shock alone would not, as a matter of pleading, be in the case. And, as was said in the case of *Lynch v. Great Northern Ry Co.*, 38 Mont. 511, 100 Pac. 616, we might be forcing upon the plaintiff a cause of action to which she makes no claim, and the special demurrer would still remain undisposed of, for the reason that that portion thereof relating to the extent of plaintiff's physical injuries, if she suffered any, should have been sustained in any event. Such injuries should be described with reasonable certainty.

It is manifest, from the wording of the judgment, that the trial court sustained both demurrers and passed upon the merits

of plaintiff's claim; but we do not do so, because the complaint is so ambiguous, unintelligible, and uncertain that, if we attempt it, we may do injustice to one or the other of the parties. The right was with the defendants of having the plaintiff allege specifically whether she claimed damages as the result of physical injuries and mental disturbance, or the latter alone, so that they might prepare for trial. They had a right, also, if the loss of the child was the result of mental disturbance alone, or if the mental disturbance was occasioned by the loss of the child, to have those facts alleged, to the end that they might raise the question of their liability by general demurrer, if they so elected. They exercised this right by filing their special demurrer. As was said by the supreme court of Vermont, in *Bovee v. Danville*, 53 Vt. 183: "The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it and a proper subject of compensation; but the rule goes no further. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachael, 'she wept for her children and would not be comforted,' a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented."

The plaintiff should make a statement of the facts constituting her alleged cause of action in ordinary and concise language. (Revised Codes, sec. 6532.)

As we cannot reach the ultimate question decided by the district court, the words "on the merits" are stricken from the judgment, and as so modified it is affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

FOSTER ET AL., RESPONDENTS, v. WINSTANLEY ET AL., DEFENDANTS; HALL ET AL., APPELLANTS.

(No. 2,637.)

(Submitted June 7, 1909. Decided June 28, 1909.)

[102 Pac. 574.]

Trusts—Real Property—Cancellation of Deeds—Principal and Agent—Fraud—Evidence—Sufficiency—Bona Fide Purchaser—Appeal and Error—New Trial—Record—Waiver—Briefs—Presumptions.

Appeal and Error—New Trial—Record—Waiver.

1. Alleged errors in rulings of the court on the admission and exclusion of evidence and the allowance of amendments to the pleadings during trial, which were not called to its attention on the submission of the motion for new trial, based upon the minutes only, and in the absence of a bill of exceptions making them a part of the judgment-roll, will be conclusively presumed to have been waived.

Same—New Trial—Form of Assignments—Presumptions.

2. Though the ground on which a new trial had been asked was stated by the judge in his certificate authenticating the record on appeal in an equity case to have been that the evidence failed to support the judgment, and such ground is not one of those enumerated in section 6794, Revised Codes, yet where appellants in their brief made the statutory assignment that the evidence was insufficient to justify the court's decision, and counsel for respondent argued the assignment on its merits, the supreme court will assume that the trial judge intended to state that the matter was properly submitted to him.

Same—Review—Briefs.

3. Review on appeal is confined exclusively to matters properly assigned in appellant's brief.

Trusts—*Bona Fide Purchaser*—Definition.

4. A *bona fide* purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and who purchases in the honest belief that his vendor had a right to sell, without notice, either actual or constructive, of any adverse rights, claims, interests or equities of others in and to the property sold.

Same—Real Property—Cancellation of Deed—Consideration—Antecedent Debt—*Bona Fide Purchaser*.

5. One to whom a transfer of real estate was made without present consideration, but merely for the purpose of securing an antecedent debt, did not occupy the position of an innocent purchaser; therefore, since he had parted with nothing of value, the cancellation of the deed resulted in no loss to him and he has no cause for complaint.

Same—Fraud—Principal and Agent—Cancellation of Deed—Evidence—Sufficiency.

6. Evidence, in an action to set aside a conveyance of real property alleged to have been made by plaintiff's agent in breach of his trust, held sufficient to support the court's decision in favor of plaintiff.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

SUIT by Emma Foster and others against E. A. Winstanley and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

This action was brought by the plaintiffs to rescind a sale made by defendant Winstanley, as agent for plaintiffs, to his codefendant Hall, of an undivided one-sixth interest in and to the Deadwood quartz mining claim, situated in Silver Bow county. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendants Hall and Strong have appealed.

The circumstances out of which this controversy grew are the following: John H. B. Foster died intestate at Missoula, Montana, in August, 1896, leaving surviving him his widow, Emma Foster and three daughters, Annie Rieben, Mattie Visel, and Leah Foster, the plaintiffs herein, his sole heirs. Some time thereafter the plaintiffs removed to Salt Lake City, Utah, where they have since resided. The decedent was, at his death, the owner in fee of an undivided one-sixth interest in the Deadwood mining claim. Since he left no other property and no debts, and the mining interest was of little value, it was not deemed necessary to have administration upon his estate. In any event, there was no administration. So the matter stood until January 15, 1906, when the plaintiff Emma Foster wrote to defendant Winstanley, who resides at Missoula, and was a friend of the Foster family, that she owned a one-sixth interest in the claim, and requested him to sell it for her. On January 17 Winstanley replied, stating that he would comply with her request, at the same time advising her to send him such data as she had touching the location, ownership, etc., of the claim. This she did. Thereupon, after making inquiry concerning it at Butte, he wrote her on February 7, stating fully his views of the condition of the market

for such property, and advising her that, though, as she knew, the whole claim had theretofore been bonded for as much as \$100,000, it would be better to sell her interest for cash, even if she had to take as little as \$3,000 or \$3,500 for it. He also proposed that if she cared to trust him with the matter, he would undertake the sale at an expense to her not to exceed \$20 or \$25. In case his view should be adopted by her, she was directed to send him a deed properly executed, but omitting the name of a grantee, with authority to himself to insert the name whenever he found a purchaser. This she also did, the deed being dated February 14, and the consideration mentioned therein being "one dollar and other valuable considerations." The deed was accompanied by a letter, prepared for the purpose by Winstanley himself, and signed by her, giving him authority to make the sale.

During the following months many letters passed between them, she constantly urging her pressing need of money as a reason for expedition on his part, and he assuring her that he was using his best efforts to accomplish the sale. On March 1 he wrote her that, having been called from the state on business, and expecting that a sale, which he had about finished negotiating, might be completed in his absence, he had caused the deed theretofore sent him by her to be recorded, after inserting his own name as grantee; that at that time he had executed his own deed to the prospective purchaser, to be delivered by his business partner upon payment of the purchase money, and that, if this should be done, his partner would forward the money to her. This sale was not completed. Thereafter the title, so far as Emma Foster was concerned, stood upon the record in the name of Winstanley, both having the belief that she was the owner of the entire interest. On May 25 Winstanley negotiated a sale to defendant Hall of the Foster interest for \$2,500, payable on June 12, provided that upon examination of the abstract, which Winstanley was to furnish, the title should be found good and the interest was free from encumbrances. The agreement was evidenced by writing signed by Hall and Winstanley and his wife. It provided that a deed should be execu-

ted at once by the latter, and put in escrow in a designated bank for delivery to Hall upon payment of the purchase price. When the abstract was examined by Hall's attorney, it was found that the record title was apparently defective, since it did not appear, either that the estate of John H. B. Foster had been distributed to the plaintiff Emma Foster through probate proceedings, or that she was the sole heir. It was then agreed by Winstanley that he would obtain another deed from Emma Foster and the three daughters, who were all *sui juris*, and also affidavits showing that John H. B. Foster was not indebted at the time of his death; and this was done. This deed was executed and delivered to Winstanley on June 7. There is a direct conflict in the evidence as to whether the name of Winstanley was inserted in this deed as grantee, but it is not material what its condition was. The affidavits were obtained and furnished by Winstanley between that date and June 26. Upon further consideration of the condition of the title, and under advice of Hall's attorney, it was agreed between Hall and Winstanley that it was necessary to have *pro forma* administration upon the Foster estate in order to obtain a decree of distribution, thus completing the record title. Thereupon Hall paid to Winstanley \$1,600 of the purchase price, and was, by agreement in writing, allowed to retain the balance of \$900 until the decree of distribution should be entered. A deed from Winstanley and wife had theretofore, on June 20, been delivered to Hall, and he had, under date of June 25, made a deed to defendant Strong. The consideration named in both of these deeds was "one dollar and other valuable considerations." It is not seriously controverted but that the deed to Strong from Hall was intended as a mere security to the latter for advances of money theretofore made by him to Hall and one Morgan Strong, in dealings between them with which Winstanley apparently had no connection. Winstanley then reported to the plaintiffs that he had sold the property for \$1,000 cash, the very best price it was possible for him to obtain, and transmitted to each of them the share of this sum to which she was entitled under the laws of succession, after deducting \$27.50, the cost of the abstract. During the time con-

sumed by these negotiations Emma Foster, who conducted the correspondence, was in ill-health, and greatly in need of money to pay living expenses and to secure medical treatment. The plaintiffs knew that Winstanley had inserted his own name in the first deed executed to him, but did not know, until some time in December, that he claimed to be the purchaser from them, and held under the second deed as owner.

On August 31 one P. M. Wigginton, business associate of Hall, made application to the district court of Silver Bow county for letters of administration upon Foster's estate. This was at the instance of Hall and Winstanley. The petition was accompanied by a written request for the appointment by all the plaintiffs. In addition to the usual allegations it alleged that the plaintiffs, being all *sui juris*, had sold their interest in the Deadwood claim, the only property left by the deceased, and the purpose of the application for letters was that their title might be properly transferred to the purchaser. The appointment having been made, Wigginton, on September 20, filed his petition, reciting that the plaintiffs had theretofore transferred their interest to Winstanley for an adequate price, had delivered possession to him, and had consented to a confirmation of their action by decree of court, in order that title might be confirmed in him. The court was asked for an order authorizing the administrator to sell the property at private sale. The order was granted. On November 22 the administrator filed his report of sale and a petition for confirmation, stating that on October 27 he had received a bid in writing from Winstanley, who offered to pay \$1,000 cash for the interest, and that in his judgment this was the highest price that could be obtained. He accordingly asked that the sale to Winstanley be confirmed. On December 8 one Leggat, who was acquainted with the claim, and who testified at the trial that the value of the Foster interest was greatly in excess of \$1,000, filed in the district court in writing an offer to increase the amount of the Winstanley bid to \$1,500. This bid seems not to have been called to the court's attention. On December 22 the administrator, apparently having abandoned the intention to have the sale reported on November

22 as having been made to Winstanley confirmed, filed another petition, asking that the interest be distributed to Winstanley, under and by virtue of the transfer by the plaintiffs by their deed of June 7. No action was ever taken on either of the last-mentioned petitions. All these proceedings were conducted by the attorney who had examined the abstract of title for the parties, and upon whose advice administration was deemed necessary.

The substance of the charge in the complaint is that Winstanley, the agent of plaintiffs, knowing that the value of their interest was greatly in excess of \$1,000, and really of the value of \$10,000, obtained the title from them upon the fraudulent representation that it was of little value, and that the defendants Hall and Strong, knowing of his fraudulent purposes to secure a profit by betrayal of the trust and confidence reposed in him by the plaintiffs, and knowing that he was the agent of plaintiffs, and not the owner, purchased from him for an inadequate price, and thus conspired with him to defraud the plaintiffs for his and their own profit. An offer is made by the plaintiffs to refund to the defendants the full amount received from them, and to do all that should in right and justice be required of them to put the defendants in the same position which they occupied prior to the alleged sale. Judgment is demanded that the different deeds, namely from plaintiffs to Winstanley, from Winstanley and wife to Hall, and from Hall to Strong, be canceled and set aside, and that Strong be required to execute to plaintiffs a reconveyance of their entire interest, free from any lien or encumbrances made or suffered by or through him or any of the other defendants.

The issues presented by the answer and replication are whether Winstanley misrepresented to the plaintiffs that he had sold the property for \$1,000 only, without any intention of accounting to them for the balance of the purchase price; whether Hall dealt with him at arm's-length as a *bona fide* purchaser, without knowledge of his relations to plaintiffs and his intentions; whether the consideration of \$2,500 paid by Hall was adequate; and whether the defendant Strong was a *bona*

fide purchaser from Hall. The court's findings are informal, but are substantially as follows: That Winstanley was agent for the plaintiffs to sell at the best cash price obtainable; that without their knowledge he became himself the purchaser for the price of \$1,000, which was inadequate, he at the time having an offer from Hall for \$2,500; that he sold to Hall, as the owner, for that sum, \$1,600 of which had been paid; that this sum was an adequate price, and the best obtainable; that Hall's conveyance to defendant Strong was intended as a security for a pre-existing debt, and that Hall had no notice of the agency of Winstanley, and made the purchase from him, and paid to him the \$1,600, in good faith, believing him to be the owner, dealing at arm's-length with the plaintiffs. As a conclusion of law it was found that Winstanley's acts were fraudulent, and entitled the plaintiffs to rescind the sale, and to recover their interest; that the deeds from plaintiffs to Winstanley, from Winstanley and wife to Hall, and from Hall to Strong should be canceled and set aside upon payment to Hall and Strong, by the plaintiffs, of the sum of \$1,600, with legal interest from June 28, 1906, until the bringing of the action, and that plaintiffs recover of Winstanley the sum of \$600, retained by him out of the payment made him by Hall, with interest upon it from the date of payment. The decree directs that Hall and Strong reconvey to plaintiffs, by sufficient deeds free from liens and encumbrances, within fifteen days after notice of its entry, upon repayment to them of the portion of the purchase price paid, with interest; that in case the conveyance should not be made, the clerk, as commissioner, be authorized to make it in their stead; that an injunction issue forever enjoining the defendants, or any of them, from asserting any right or title to the property, and that plaintiffs recover their costs. The defendants did not move for judgment upon the findings.

Mr. C. M. Parr, Mr. J. L. Wines, Messrs. Gunn & Rasch, and Messrs. Wight & Pew, for Appellants.

If the agent, at the time of effecting the purchase, had knowledge of any prior lien, trust, or fraud affecting the property,

no matter when he acquired such knowledge, his principal was affected thereby. (*Donald v. Beals*, 57 Cal. 399; Wharton on Agency, sec. 179.) And if an agent, when acting within the scope of his authority, perpetrates a fraud or wrong on another, or occasions a consequential injury, the principal is liable. (Story on Agency, secs. 452-456; *Foster v. President etc. Essex*, 17 Mass. 479, 9 Am. Dec. 168; *Williams v. Mitchell*, 17 Mass. 98; 1 Parsons on Contracts, 73.) A principal, by keeping the fruits of an unauthorized act of his agent, ratifies the act and makes it his own. (*Davies v. Krum*, 12 Mo. App. 279; *Coykendall v. Constable*, 99 N. Y. 309, 1 N. E. 884; *Gaudelupo etc. Min. Co. v. Beatty* (Tenn.), 1 S. W. 348; *Garbutt & Donovan v. Mayo*, 128 Ga. 269, 57 S. E. 495.)

Where a third person has purchased from an agent in a *bona fide* transaction and paid the consideration under the supposition that the agent was duly authorized to make the sale, a court of equity will protect the purchaser, if it can do so consistently with principles of law. (*Union Mut. L. Ins. Co. v. Masten*, 3 Fed. 881; *Lawrence v. Guaranty Investment Co.*, 51 Kan. 222, 32 Pac. 816; *Equitable Mortgage Co. v. Butler*, 105 Ga. 555, 31 S. E. 395.) And where a loss must fall on one of two innocent parties, the one whose neglect or lack of foresight made the loss possible must bear the burden. (*Hill v. Lowe*, 6 Mackey, 428; *McClelland v. Bartlett*, 13 Ill. App. 236; *Noble v. Moses*, 74 Ala. 604; *Peake v. Thomas*, 39 Mich. 584; *Hertell v. Bogert*, 9 Paige, 52; *Appeal of Pennsylvania R. Co.*, 86 Pa. 80; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482.) Where one puts it in the power of another to commit a fraud, and the latter exercises such power, the former must suffer the loss. (*Jeffers v. Gill*, 91 Pa. 290; *Coles v. Anderson*, 27 Tenn. 489; see, also, *Begley v. Combs*, 32 Ky. Law Rep. 538, 106 S. W. 246; *Esty v. Cummings*, 80 Minn. 516, 83 N. W. 420; *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Pence v. Arbuckle*, 22 Minn. 417; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008.)

We have been unable to discover a case holding that a principal can disaffirm the sale of property by his agent within the scope of his authority, and for the best price obtainable, on the ground that the agent stole a part of the purchase price. (See *Chetwood v. Berrian*, 39 N. J. Eq. 203; *Hall v. Kary et al.*, 133 Iowa, 465, 119 Am. St. Rep. 639, 110 N. W. 930; *Kramer v. Winslow*, 130 Pa. 484, 17 Am. St. Rep. 782, 18 Atl. 923.)

Mr. William Scallon, and Mr. William L. Lippincott, for Respondents.

The burden is upon the defendant to show that he is a purchaser in good faith and for value; and, if he fails in either requirement, he must submit to an avoidance of the transaction, and a reconveyance. (*Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765; *Weber v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388; *Story's Equity Pleadings*, sec. 805.)

Strong was not a purchaser for value, or a purchaser in good faith. He did not part with anything on the strength of the deed. The deed may be set aside without his being any worse off than if it had never been made; and he has, therefore, no equity to protect as against the plaintiffs. (*Reed v. Brown*, 89 Iowa, 454, 48 Am. St. Rep. 406, 56 N. W. 663; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217.) One who connects himself with others in a conspiracy to defraud will not be heard to say that the whole plan was concocted before he became an associate. By connecting himself with them, and aiding in the execution of the plan, he adopts their prior acts and declarations as his own; as much so as if he had been present and assented to each successive step in carrying out and consummating the fraud. (*Apthorp v. Comstock*, 2 Paige, 482; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110; *Den v. Johnson*, 18 N. J. L. 87; *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, 107 Am. St. Rep. 765, 60 Atl. 74.)

The rule of ratification and waiver is one of justice and not of injustice, and there must be an intent to ratify or waive. While it is true that the intent may be presumed or inferred, such presumption or inference must be such as naturally and justly arises. The presumption or inference cannot be indulged when the facts exclude it, as in this instance. (2 Pomeroy's Equity Jurisprudence, 964; 6 Ency. of Ev. 78.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Counsel for both plaintiffs and defendants have filed elaborate briefs and have discussed many questions which are not presented by the record. Most of them arise upon rulings upon the admission and exclusion of evidence and the allowance of certain amendments to the pleadings during the course of the trial. The motion for new trial was made upon the minutes of the court. In his certificate authenticating the record the trial judge states that the motion "was heard on the minutes of the court on the following grounds only: (1) That the evidence fails to support the judgment; (2) that Mrs. Foster allowed Winstanley to hold himself out as owner, by insertion of his name in the deed; (3) that plaintiffs, other than Mrs. Foster, were not principals, and Winstanley not their agent."

Whatever merit there may be in the contentions of appellants with reference to the rulings referred to, since they were not submitted to the trial court on the motion for a new trial, and an opportunity thus afforded to it to correct any of the errors alleged upon them, in the absence of a bill of exceptions making them a part of the judgment-roll, they are not reviewable by this court. By failing to bring them into the record by a separate bill of exceptions, and omitting to submit them to the trial court for review on the motion based upon the minutes only, and by presenting the record to this court with a certificate attached showing this fact, it must be conclusively presumed that they waived all such alleged errors. Counsel for respondents make this contention, and it must be sustained.

The notice of intention includes errors of law occurring during the trial, yet, if the certificate of the judge is to be taken as a correct statement of the contentions made in support of the motion, the only question which we may properly consider upon the appeal from the order denying it is that the evidence is insufficient to support the findings or decision. The statement that "the evidence fails to support the judgment" is not one of the grounds for new trial enumerated in the statute (Revised Codes, sec. 6794); but, since counsel for appellants make the statutory assignment in their brief that the evidence is insufficient to justify the court's decision, and counsel for respondents have argued this assignment on the merits, we shall assume that the judge intended to state in his certificate that the question of the insufficiency of the evidence to support the decision was properly submitted and decided by him.

We have set out in the foregoing statement the facts about which there was no real controversy on the trial. There were but three questions as to which there was any conflict in the evidence, to-wit, whether Hall had knowledge of Winstanley's relations to plaintiffs at the time the contract of sale was made, and his intention to use his position to his own profit; whether the consideration of \$2,500 paid by him to Winstanley was adequate, and whether Strong was a purchaser in good faith for value. Upon the first two of these the court found in favor of the defendants; upon the third the finding was that the transfer was intended as a mere security for a pre-existing debt. A great deal of evidence was introduced by the plaintiffs tending to show that Hall, either by information obtained from Winstanley or through his attorney, was fully informed of the fact that Winstanley was not dealing with him as the owner, but merely as the agent of plaintiffs. This was controverted by Hall, Wigginton, and their attorney, all of whom, while admitting that they knew that the title was defective, and had Winstanley to procure the deed of June 7, together with the affidavits of plaintiffs showing that they were the sole heirs, and that there were no debts due from the estate, and thereafter instituted and conducted the probate proceedings, stated that they supposed Winstanley was the owner

by purchase of the Foster interest, and had no knowledge of his relations to plaintiffs, or that they were the real owners, until their attention was called to the fact by the inquiry produced by the advance bid made by Leggat. Looking to the whole of the evidence on this point, it may well be questioned whether the court should not have found otherwise; even so, appellants have no right to complain, because the finding is really in their favor. So, also, upon the issue as to the adequacy of the price paid by Hall. The evidence would have justified a finding that it was entirely inadequate.

No question is made but that, as against Winstanley, the findings are substantially correct. He was, upon the record, the apparent owner. According to the testimony of the defendants, he held himself out to Hall as the owner, and, having availed himself of the means at his disposal to make himself appear as such, the finding that he was a fraudulent purchaser, whereas he was only the trusted agent of plaintiffs, does not affect the position of the other defendants. Whether the court drew the correct conclusion of law from the facts found, and entered the proper decree, we may not decide. Among the assignments of error we find nothing on this point, though counsel devote to it a part of their argument under the head of insufficiency of the evidence to sustain the findings, and cite some authorities in support of their view that, since the court found that Hall made the purchase, and paid an adequate consideration for the property, without knowledge of Winstanley's relations to the plaintiffs, the plaintiffs are not entitled to have the sale rescinded. The court evidently entertained the view that, though Hall was innocent of any wrongdoing, yet since the purchase price had not been fully paid, the plaintiffs were, notwithstanding his innocence, entitled to rescind the sale. Under the application of the rule that review by this court will be confined exclusively to the matters properly assigned in the brief, we must forego consideration of the action of the court in granting relief to the extent it did.

The only other assignment requiring notice is that the complaint does not state a cause of action. Special emphasis is laid upon the fact that it is not alleged therein that defendant Strong had any knowledge of Winstanley's wrongdoing. Since it was practically admitted during the trial that the transfer to him by Hall was without present consideration, and merely for the purpose of securing an antecedent debt, he did not occupy the position of an innocent purchaser. The court at the close of the trial permitted an amendment alleging this fact. This made the complaint sufficient as against him, without regard to his connection, or lack of connection, with the dealings between Hall and Winstanley. His right to retain the title acquired from Hall rested upon the validity of Hall's title; and, inasmuch as he had parted with nothing of value, the setting aside of the sale and the cancellation of the deed resulted in no loss to him. A *bona fide* purchaser is "one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without notice, actual or constructive, of any adverse rights, claims, interest, or equities of others in and to the property sold." (5 Cyc. 719; see, also, 2 Pomeroy's Equity Jurisprudence, sec. 749, 1 Perry on Trusts, sec. 239; *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998; *Reed v. Brown*, 89 Iowa, 454, 48 Am. St. Rep. 406, 56 N. W. 661; *Alden v. Trubee*, 44 Conn. 455; *Woolridge v. Thiele*, 55 Ark. 45, 17 S. W. 340.) Strong does not fall within this definition. Upon a careful consideration of the pleading as a whole, we find no infirmity in it, in this or other respects, justifying appellants' criticism.

We have been precluded, in a great measure, from an examination of this cause on the merits. Were the record in a condition to permit such an examination and a determination of the questions of fact involved under the provisions of the Code applicable (Revised Codes, sec. 6253), we should feel impelled to a different conclusion from that arrived at by the district court as to the conduct of Hall. The evidence indicates to

us that Hall knew of Winstanley's relations to plaintiffs, and, to say the least, was willing that he should profit by a betrayal of the trust reposed in him by the plaintiffs. Hall, therefore, has no reason to complain that he has been wronged by the requirement that he and Strong surrender the property as soon as the purchase money paid by him has been refunded.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied October 6, 1909.

UHLEIN, RESPONDENT, v. CAPLICE COMMERCIAL CO.,
APPELLANT.

(No. 2,691.)

(Submitted June 14, 1909. Decided June 28, 1909.)

[102 Pac. 564.]

Quieting Title—Foreign and Domestic Corporations—Powers and Privileges—Constitutional Provisions—Right to Maintain Action—Enforcement of Contracts—Statutes.

Quieting Title—Evidence—Letters.

1. In an action to quiet title to certain real property, claimed by defendant to have been donated to it by a foreign brewing company, letters written by the latter to defendant's predecessor and answers thereto, which showed, in connection with other testimony, that the company bought and paid for the land and the building thereon, were admissible.

Foreign Corporations—"Carrying on" of Business—What does not Constitute.

2. *Held*, that the shipping of beer into the state by a foreign corporation and selling the same to a distributing agent did not constitute a carrying on of business in the state within the meaning of section 4413, Revised Codes, relating to the steps necessary for such a corporation before it can carry on business in Montana.

Same—Noncompliance with Statute—Right to Maintain Actions.

3. The failure of a foreign corporation to comply with the law authorizing such corporations to do business in the state did not deprive it of the right to maintain a suit to quiet title to real property claimed

by defendant as a donation. Its action in this respect was not an attempt to enforce a contract.

Same—Holding Property—Statutes—Applicability.

4. *Held*, that section 3823, Revised Codes, declaring that a corporation cannot hold property in a county, or maintain an action in relation thereto, unless it has first filed a certified copy of its articles of incorporation in the office of the county clerk, applies to domestic corporations only.

Same—Privileges—Constitutional Provisions—Construction.

5. The inhibition of the state Constitution (Art. XV, sec. 11), that no foreign corporation shall be allowed to exercise or enjoy within the state any greater rights or privileges than are possessed or enjoyed by corporations of the same or similar character created under the laws of Montana, is simply a limitation placed upon the legislature in enacting laws, and does not mean that the placing of a burden upon a domestic corporation shall have the effect of imposing a like one upon foreign corporations.

Same—Statutes—Validity—Who may Assail.

6. It is only in cases where a foreign corporation is attempting to exercise or enjoy greater privileges than those possessed by domestic corporations expressly given to it by the legislative assembly contrary to the provisions of section 11, Article XV, of the Constitution, that its right to exercise the same may be questioned.

Appeal from District Court, Silver Bow County; Geo. B. Winston, Judge presiding.

ACTION by August Uihlein against the Caplice Commercial Company. Decree for plaintiff, and defendant appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

The burden rested upon plaintiff to prove his title and right to possession. This is the rule in ejectment, and must necessarily be the rule in an action of this kind. (*Willis v. Wozencraft*, 22 Cal. 608; *Owen v. Fowler*, 24 Cal. 193; *Owen v. Morton*, 24 Cal. 373; 2 Greenleaf's Evidence, 331.) The defendant, being in possession, there is a presumption in its favor, and this presumption must be overcome by the plaintiff. (*People v. Leonard*, 11 Johns. 504; *Sullivan v. Dimmitt*, 34 Tex. 114.) There must also be a showing by plaintiff of his present right of possession. (*Kile v. Tubbs*, 32 Cal. 333; 2 Greenleaf's Evidence, 304.) The plaintiff, if he recover at all in ejectment, must recover upon the strength of his own title, and this must be true in an action of this kind. (*Watts v. Lindsay*, 7 Wheat. 158, 5 L. Ed. 423; *Busenius v. Coffee*, 14 Cal. 91.)

If it could be found, as claimed by the plaintiff, that the Schlitz Brewing Company was maintaining the icehouse in question for the benefit of itself in Montana, and was engaged in shipping beer which was to be stored in that house for its own benefit and not for the benefit of the John Caplice Company or the Caplice Commercial Company, we submit it would be doing business in this state. In *Bank of British North America v. Madison*, 99 Cal. 125, 33 Pac. 762, the judgment awarded the plaintiff was reversed because it had not complied with the law. (See, also, *Bank of British North America v. Alaska Imp. Co.*, 97 Cal. 28, 31 Pac. 726.)

Under section 11, Article XV, of the Constitution, no foreign corporation shall have any greater rights or enjoy any greater privileges than a domestic one. If a domestic corporation cannot purchase, or maintain or defend an action with reference to property, without compliance with the law, a foreign corporation cannot do so. The constitutional provision is plain and self-acting. (See *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147; *Bank of British Columbia v. Page*, 6 Or. 431; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *State v. Chicago, Mil. & St. P. Co.*, 80 Iowa, 586, 46 N. W. 741; *Crefeld Mills v. Goddard*, 69 Fed. 141; *Cary-Lombard Land Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *International Text-book Co. v. Pigg*, 76 Kan. 328, 91 Pac. 75; *Allen v. City of Milwaukee*, 128 Wis. 678, 116 Am. St. Rep. 50, 106 N. W. 1099, 5 L. R. A., n. s., 680.) The corporation must comply with the conditions imposed. (*State v. Fleming*, 70 Neb. 523, 529, 97 N. W. 1063; *United States Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. 398; *Commonwealth v. Parlin etc. Co.*, 118 Ky. 168, 80 S. W. 791; *Coler v. Tacoma R. & P. Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413; *Hoskins v. Rochester S. & L. Assn.*, 133 Mich. 505, 95 N. W. 566; *Booth & Co. v. Weigand*, 28 Utah, 372, 79 Pac. 570; *State v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062; *Miller v. Monumental Sav. & L. Assn.*, 57 W. Va. 437, 50 S. E. 533; *Iowa Falls Mfg. Co. v. Farrer*, 19 S. D. 632, 104 N. W. 499.) The

certificate required by the statute may be filed at any time before the trial of the case. (*Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426.)

Messrs. Kirk, Bourquin & Kirk, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that at all times therein mentioned the plaintiff was the owner, and entitled to the possession, of lots 2 and 3, in block 16, of the Noyes and Upton Railroad addition No. 2 to the city of Butte, in Silver Bow county, and that the defendant, a Montana corporation, claims an interest therein adverse to plaintiff. The prayer is that the defendant be required to set forth the nature of its claims; that the plaintiff be decreed to be the owner of the premises, and the defendant adjudged to have no interest therein. Defendant for answer denied all of the allegations of the complaint, save that it is a corporation, and as an affirmative defense alleged that it has been the owner and in possession of the premises since July 1, 1893; that since that date it and its predecessors have been in the absolute, actual, exclusive, open, notorious, continuous, and adverse possession, claiming to own the same; "that in order to induce the John Caplice Company, the defendant's predecessor in interest, to handle its product (beer) exclusively, the Schlitz Brewing Company, a Wisconsin corporation, procured the land described in the complaint, and donated it and induced the said John Caplice Company to make buildings and improvements thereon, and that it contributed thereto for and in consideration of the said John Caplice Company exclusively handling and selling its product; and that the defendant succeeded to all rights with reference thereto in the handling and sale of the product of said corporation which were held by said John Caplice Company, and the said Schlitz Brewing Company gave it the exclusive sale of its product in and about the city of Butte, and assented to the transfer of said property and property rights by the John Caplice Company to it and donated

the same to the defendant; that the said John Caplice Company and this defendant spent large sums of money in establishing a trade for the Schlitz Brewing Company's beer in and about the city of Butte, and in reliance upon the donation of said premises to the John Caplice Company and to it and on its purchase of the same from the John Caplice Company." It is further alleged that the plaintiff is an officer of the Schlitz Brewing Company, and holds the title to the premises for the corporation, which has never complied with the laws of Montana authorizing foreign corporations to do business or hold property in this state. A reply was filed putting in issue the affirmative allegations of the answer. However, it was admitted at the trial that the plaintiff holds the title to the property in question simply as trustee for the Schlitz Brewing Company. The cause was tried to the court, a jury having been waived. No findings of fact were requested or made, and the court entered a judgment declaring all claims of the defendant to be invalid, decreeing the plaintiff to be the owner of the premises and entitled to the possession thereof, and that his title thereto be quieted against all claims of the defendant. From this judgment and an order denying a new trial, the defendant appeals.

It appears to have been assumed in the district court that the action is one in equity to quiet plaintiff's title. The defenses relied on in the answer are (1) that the Schlitz Brewing Company donated the premises to the defendant's predecessor in interest; and (2) that the plaintiff cannot maintain the action for the reason that the Schlitz Brewing Company, the real party in interest, has not complied with the laws of Montana authorizing it to do business in this state. It is also contended by counsel that plaintiff cannot recover for the reason that the Schlitz Brewing Company has contracted to allow the defendant to remain in possession until the expiration of the latter's charter, in any event. It was admitted at the trial that the record legal title to the premises was in the plaintiff, and that the Schlitz Brewing Company had never filed in the office of the Secretary of State or with the clerk of Silver Bow county,

or any county, a copy of its charter or articles of incorporation or any statement. No objection is made to the form or scope of the decree.

The court admitted in evidence a series of letters from the Schlitz Brewing Company to John Caplice & Co., one of the predecessors in interest of the defendant, and the answers thereto. These were objected to for the reasons that they were not properly identified, and that the letters of the brewing company were declarations in its own favor. We think the letters were properly admitted. They, in connection with other testimony, show that the Schlitz Brewing Company bought and paid for the ground in question, furnished the plans for the beer depot which was erected thereon and built the depot at its own expense, through the agency of the defendant's predecessor, John Caplice & Co., a corporation, which insisted upon and obtained credit on its account with the brewing company for all moneys expended by it for the land or upon the building. The transaction took place in 1892. The subject was initiated by a letter from the Schlitz Brewing Company to John Caplice & Co., dated Milwaukee, Wis., October 26, 1892, as follows: "We are in receipt of your favor of the 21st inst., and, as we note that the railroad insists upon our paying rent for the premises upon which the icehouse is to be built, we would prefer to purchase the property and own it ourselves. Please endeavor to buy the same for us at \$2,400, or less if you can, and send us a plan of the lot showing the exact dimensions, giving the level of the railroad track and the street and the location of water and sewer. We will then have our architect make a plan for a substantial building in accordance with the suggestions which you will give us, and will endeavor to have the building completed as soon as possible." Under date of November 17, 1892, John Caplice & Co. wrote as follows: "We have completed purchase of lot for you as per instructions and have taken the liberty of drawing on you to-day for amount of purchase price, \$2,400, and fee for recording deed \$2.75, draft \$2,402.75. The deed is now at the recorder's office and will be sent to you as soon as returned to us." And again, on Novem-

ber 28, 1892: "We inclose you herewith abstract of title and warranty deed to lot bought for you as per instructions." And with regard to the building (January 19, 1893): "We signed the agreement and bond as your agents. • • • We can secure an architect here for you, one who will see that the building is properly built." It appears that the beer was shipped f. o. b. Milwaukee, and therefore became the property of the defendant and its predecessor before it reached Butte.

In order to maintain its defenses that the property had been donated to its predecessor, and that it was entitled to the possession of the same in any event under its contract of agency for the sale of beer, the defendant introduced the testimony of Charles Dillman, in substance as follows: "My connection with the Schlitz Brewing Company began in December, 1892, in the capacity of traveling representative. I was traveling agent for the disposition of the product of their brewery and for making loans and closing contracts, and so forth. I first came to Butte in the early part of 1893. Then it was that my first relationship with the John Caplice Company began. I subsequently discovered that they changed their name to John Caplice & Co. I could not recall the month when that was, but it was in 1896. I remember when they ceased to do business under the name of John Caplice & Co. and took up the name of the Caplice Commercial Company. I know something about the details of that myself. I know about the organization. I was present at the time when they organized that company. I became interested in it about three months after the first steps were taken. At this initial meeting in October, 1897, it was understood and agreed that I would interest myself and become interested. The Joseph Schlitz Brewing Company did not know that. After we had agreed and the money was subscribed and the charter was in there or was sent to Helena, we all signed the agreement. Then came the question how long the agency of the Schlitz Brewing Company could be obtained. I answered: 'As long as the beer is paid for, or the goods paid promptly for, and the sales of beer increase, they can have the agency as long as their charter lasts.' As to whether or not I

had any authority from the Schlitz Brewing Company at that time to make a contract with the Caplice Commercial Company with respect to its right to purchase beer, I will say that there was no contract entered into at that time. I remember Mr. Caplice asking me how long the Caplice Commercial Company would be able to get the beer from the Schlitz Brewing Company. We had an understanding that the Schlitz Brewing Company would furnish them the beer at a mentioned price, and, if the payments and the sale increased, that they could have the agency for the length of their charter—twenty years. The sales of beer increased from 8,000 barrels a year to 22,000 barrels when the Schlitz Brewing Company took the agency away.”

Eugene Wuesthoff, the manager of the Schlitz Brewing Company, testified: “Dillman’s authority as a general rule was limited. His authority was to see the trade, the parties we were selling to as well as new trade, make sales on the basis of prices and terms furnished by the home office, his terms to be approved and corroborated by the home office. No one representing the Schlitz Brewing Company had any authority to make disposition of this property. The Schlitz Brewing Company made no contract either with John Caplice Company or its successor, the Caplice Commercial Company, for the handling of Schlitz products in Butte for any particular length of time. Mr. Dillman was never authorized to make any such contract. The Schlitz Brewing Company placed the beer depot at the disposal of the Caplice Commercial Company for the purpose of storing beer and to be used by the Caplice Commercial Company during the time they were buying beer from the brewing company. Our interest was to have the beer properly handled and properly treated to give satisfaction.” It was also shown that the beer depot was burned in 1898 or 1899; that the cost of repairs was \$2,000, which amount was paid by the Caplice Commercial Company and refunded by the Schlitz Brewing Company. The Schlitz Brewing Company also paid the taxes on the property.

Emmet Ryan testified that he was present when the Caplice Commercial Company was organized, and that nothing was said at the meeting concerning any time arrangement for the sale

of beer. Witness was secretary of the Caplice Commercial Company until 1903, and had no knowledge or information of any kind as to any time agreement or arrangement with the Schlitz Brewing Company, and had no knowledge that the Caplice Commercial Company claimed title to the beer depot.

Joseph Ledwidge testified that he was a former employee of the Caplice Commercial Company; that in 1903 the president of the company attempted to get from the Schlitz Brewing Company a reduction in the price of beer; that the Schlitz Brewing Company agreed to reduce the price, provided the Caplice Commercial Company would engage to handle no other beer for a period of five years, but, when the contract was prepared and sent to Butte, Mr. Dillman and Mr. W. A. Willoughby, two directors, refused to sign it "claiming that they would not tie themselves up with anyone."

W. A. Willoughby corroborated Ledwidge, and also testified that he was present at the time of the organization of the Caplice Commercial Company, and that he never heard of any "proposition concerning the time contract or arrangement for handling the product of the Schlitz Brewing Company" until the same was mentioned in an affidavit signed by Dillman, filed in one of the lawsuits growing out of the controversy.

Dillman testified in rebuttal that the reason he and Willoughby refused to sign the contract mentioned by Ledwidge was because there was a contract in existence; but Willoughby testified that the subject of another contract was never mentioned.

In view of the foregoing evidence, we are clearly of the opinion, not only that Dillman had no authority to give to the Caplice Commercial Company the agency for the sale of the Schlitz Brewing Company's products for any definite period of time, but that he did not attempt to do so. According to his own testimony, the language employed by him amounted simply to the expression of an opinion on the subject of inquiry by Caplice. This testimony falls far short of establishing a contract by the terms of which the defendant was to remain in possession of the beer depot until the expiration of its charter; and we find in the record no testimony whatsoever that would warrant the con-

clusion that the Schlitz Brewing Company had donated the ground in question or the improvements thereon to the defendant or any of its predecessors.

The contention that the plaintiff cannot maintain this action is not well founded. So far as the testimony shows, the Schlitz Brewing Company is not carrying on business in this state. Neither is it attempting to enforce any contract. In the case of *Powder River C. Co. v. Commissioners*, 9 Mont. 145, 22 Pac. 383, the court said: "We are of the opinion that the statute prohibits merely the carrying on of business, that the penalty for violating the law is that the acts and contracts in the course of such business are void; but the law does not deprive a foreign corporation of any right to sue, although the law may prevent the enforcement of any contract by such foreign corporations as refuse to comply with the law."

But it is contended that, as section 3823, Revised Codes, provides that "no corporation hereafter formed shall • • • hold property in any county in this state" without filing a certified copy of the copy of its articles of incorporation on file in the office of the Secretary of State, in the office of the county clerk of the county in which such property is situated, and cannot maintain an action in relation to such property, without complying with said provisions, the plaintiff, as trustee of the Schlitz Brewing Company, cannot maintain this action. Section 3823, *supra*, has reference solely to domestic corporations. What is said with reference to sections 3895 and 3908, Revised Codes, in the case of *Helena Power & Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L. R. A., n. s., 567, is equally applicable to section 3823. But, it is argued by appellant's counsel, assuming this to be true, if a domestic corporation cannot hold property or maintain an action in relation thereto, without first complying with section 3823, *supra*, a foreign corporation cannot, for the reason that, if the latter has this privilege, it enjoys greater rights than a domestic corporation under like circumstances; and he cites section 11, Article XV, of the state Constitution in support of his contention. That section reads in part as follows: "No • • • corporation formed under the laws of any other

• • • state shall have or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." Primarily, this constitutional provision is addressed to the legislative assembly. As was well said in the case of *South Yuba Water & Mining Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222, discussing a statute similar to our section 3823, *supra*: "Whether or not it is expedient that foreign corporations should be required to deposit record evidence of their incorporation in every county in this state where they have property, in like manner as domestic corporations are required to do, is matter for consideration for the legislature alone." The constitutional provision relied on was intended to prohibit the passage of laws giving to foreign corporations the right to exercise or enjoy any greater privileges than those possessed or enjoyed by domestic corporations, and it is only in cases where a foreign corporation attempts to exercise or enjoy a right or privilege expressly given to it by the legislative assembly that its right to exercise the same may be questioned. The mere fact that a burden is placed upon domestic corporations from which foreign corporations are exempt does not operate to bring foreign corporations within the provisions of a law intended to apply solely to domestic corporations.

The circuit court of appeals for the eighth federal circuit in discussing this same constitutional provision in *First National Bank of Butte v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131, said: "The contention is that under this provision of the Constitution a statute imposing any duty or obligation on a domestic corporation which is not also imposed on foreign corporations doing business in the state is unconstitutional. The position is untenable. • • • In the very nature of things, it is impossible to provide exactly the same system of laws for foreign as for domestic corporations. It is never done. The constitutional provision quoted contemplated no such thing. It is an inhibition against the grant of powers and privileges to foreign corpora-

tions that are not granted to, or cannot be enjoyed by, domestic corporations under like conditions."

For some reason, presumed to be good and sufficient, the legislative assembly has seen fit to ordain that domestic corporations shall file in the office of the county clerk of the county in which they desire to hold property certain evidences of their incorporation. The penalty for failure to comply with the provisions of section 3823, *supra*, is that the corporation shall not maintain or defend any action or proceeding in relation to such property. In this connection it may be suggested that as the Schlitz Brewing Company was not doing business in this state, and had not, therefore, filed with the secretary of state an authenticated copy of its articles of incorporation as provided by section 4413, Revised Codes, then it would be impossible for it to comply with section 3823, *supra*, for the reason that that section makes it incumbent upon the corporations therein referred to, to file with the county clerk a copy of the copy of the articles of incorporation theretofore filed in the office of the Secretary of State. If the argument be followed to its logical conclusion, the result would be that this statute (section 3823) should be declared void because it places upon domestic corporations a burden not imposed on foreign corporations. We fail to see how such construction would assist the appellant, for the reason that only a domestic corporation which had failed to comply with the provisions of section 3823, *supra*, could take advantage of it. As was said in *First National Bank v. Weidenbeck*, *supra*: "But if a foreign corporation were given greater rights and privileges in the state than were enjoyed by domestic corporations, it is not perceived how that fact would annul all laws in the state applicable to domestic corporations. * * * It (the constitutional provision) does not nullify all laws for the government of domestic corporations when those laws are not, and cannot be, applied to foreign corporations." If the appellant's position should be upheld, it would not be necessary for any corporation to comply with section 3823, *supra*, but appellant is not in a position to raise that question, for the reason, as heretofore stated, that section 3823 does not affect foreign corporations.

We think the foregoing disposes, directly and incidentally, of all points and suggestions made in the briefs and upon oral argument. We have read the testimony, and are satisfied that no court of equity could arrive at any different conclusion on the merits than did the district court of Silver Bow county, and the judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

WINNICOTT, APPELLANT, v. ORMAN ET AL., RESPONDENTS.

(No. 2,684.)

(Submitted June 16, 1909. Decided June 28, 1909.)

[102 Pac. 570.]

Personal Injuries—Master and Servant—Burden of Proof—Evidence—Insufficiency—Nonsuit—New Trial Order—Opinions of District Court—Record on Appeal.

New Trial Order—Opinion of District Court—Not Part of Record.

1. Where a motion for a new trial, made on several of the statutory grounds, is sustained by an order general in its terms, the supreme court in its review is not restricted to a consideration of the reason for his action given by the judge in a memorandum opinion attached to the order; such opinion is not a part of the record on appeal; but if the order can be justified upon any of the grounds of the motion, it will be affirmed.

Personal Injuries—Evidence—Insufficiency—Nonsuit.

2. In a personal injury action the burden is upon plaintiff to prove the negligence of defendant as alleged, and that such negligence was the proximate cause of his injury; hence if the conclusion to be reached from his testimony is equally consonant with the truth of his allegations and some other theory or theories inconsistent therewith, it becomes a mere conjecture and insufficient to establish his case, and nonsuit should be granted.

Same.

3. The district court not only did not err in granting a new trial, but should have nonsuited plaintiff, in an action for damages to compensate him for personal injuries alleged to have been sustained by him, while employed by defendants as a laborer in railroad construction work, by reason of their failure to ascertain whether there was a "missed hole" after one of their blasting operations,—where the evidence introduced by him left it to conjecture whether the explo-

sion was caused by his picking into a "missed hole" or into a piece of dynamite left loose in the dirt, or into a cap, used to explode the charge, accidentally dropped by a workman the day before the accident.

Same—Contractors—Subcontractors—Liability—Evidence—Insufficiency.

4. In an action against a contractor and a subcontractor for injuries to a member of a railroad construction crew, evidence held insufficient to show that plaintiff was employed by the former.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by William T. Winnicott against J. B. Orman and others. From a judgment and an order granting defendants a new trial, plaintiff appeals. Affirmed.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE
OPINION.

Action by plaintiff for damages for a personal injury, alleged to have been suffered by him through the negligence of the defendants during his employment by them as a laborer in the construction of a railroad.

During the month of January, 1907, the defendants Orman & Crook, copartners, were engaged in construction work for the Chicago, Milwaukee & St. Paul Railway Company of Montana. At a point some miles south from the city of Butte there was a construction camp, known as "Moran's camp." Plaintiff had been at work at this camp from January 15 up to the 29th. It is alleged that the defendant Moran was employed by defendants Orman & Crook to supervise and oversee the work; that on January 29 the said Moran, acting by and through his boss or foreman, one Rumsey, had general control of the laborers employed at that point, including plaintiff; that, while acting within the scope of his employment, the said Rumsey ordered plaintiff and one Melton to loosen certain frozen ground, to be removed for the building of the roadbed, by picking it up with tools commonly known as pickaxes; that without plaintiff's knowledge the defendants had carelessly and negligently made the said ground unsafe and dangerous, by leaving in it what is known as a "missed hole." The complaint then proceeds: "That on the

twenty-eighth day of January, 1907, the boss then having general supervision, control, and command of said laborers at the said Moran's camp, while acting within the scope of his employment, requested and commanded a certain number of said laborers, plaintiff and the said Guy M. Melton not being among the said number, to loosen the said frozen ground by drilling holes in it, and placing in the said holes powerful explosives, commonly known and designated as giant powder and dynamite and by exploding the said explosives. That connected with the said explosives were fuse, a material which burns slowly, and thereby permits persons to seek a safe distance before the explosion occurs, which occurs when the fire reaches the explosive. That connected with some of the explosives were what are commonly known and designated as caps, a material which, when brought into a sudden and forcible contact with some other hard object, emits a little spark of fire which, when it comes into contact with the giant powder or dynamite, causes an explosion.

"That on the said twenty-eighth day of January, 1907, the said certain number of laborers at Moran's camp had been requested and commanded to loosen the said frozen ground by means of the said explosions. That because of a defective fuse, or because of some fact not known to the plaintiff, the fire never reached the explosive in the said missed hole, or because of the fact that the said explosive was damp and frozen, the said explosion did not occur, or was not complete, and the said explosive remained in the said missed hole during the night of the twenty-eighth day of January, 1907, until the twenty-ninth day of January, 1907, and until plaintiff and the said Guy M. Melton were requested and commanded by the said walking boss to pick loose the said frozen ground in which was the said missed hole, and that neither the plaintiff nor the said Guy M. Melton knew, or had reason to know, of the presence of the said missed hole, but that the defendants had knowledge of the presence of the said missed hole in the said frozen ground, or in the exercise of ordinary care and diligence would have had knowledge thereof, because of the fact that the said boss having general supervision and control and command of the said laborers at the said Moran's camp on the

said twenty-eighth day of January, 1907, had knowledge thereof, or in the use of ordinary care and diligence would have had knowledge thereof.

"That without negligence on the part of the plaintiff, and while plaintiff was exercising due and diligent care, and through the negligence of the defendants, while the plaintiff and the said Guy M. Melton, at the request and command of the defendants, were in the act of picking loose the said frozen ground, either the pickax that plaintiff was using, or the one that the said Guy M. Melton was using, came into sudden and forcible contact with the explosives in the said missed hole, or with a cap connected with the said explosives, thereby causing an explosion, which said explosion caused certain parts of the said explosive, among which were burning powder, glycerin, and other burning material, to be thrown and hurled into the eyes and face and at the body of the plaintiff, causing him to become permanently blind; destroying his eyes; to be disfigured for life; to suffer great pain and agony of mind; causing his shoulders to be bruised and bruising his left lower limb; and causing him to become permanently disabled," etc.

The separate answer of defendant Moran alleges that at the time stated in the complaint he was engaged in construction work under a subcontract with Orman & Crook; that plaintiff was employed by him; that when the plaintiff entered such employment he knew that it was of such character as to require the use of explosives, and that he therefore assumed the risk incident to that character of work. He denies generally all the allegations of the complaint which are not admitted by this paragraph.

The defendants Orman & Crook, admitting that they were co-partners as alleged, deny all the other allegations of the complaint. It is alleged that prior to the time the plaintiff was injured they had obtained, from a firm known as McIntosh Bros., a subcontract to do construction work; that they had in turn sublet a portion of the work covered by this contract to defendant Moran; that they had no control or supervision of the work being done by him, their only power in that behalf being to ac-

cept or reject it when completed; and that plaintiff was never at any time in their employ. Upon these allegations there was issue by reply.

At the conclusion of plaintiff's evidence the defendants interposed separate motions for nonsuit. These having been overruled, and the defendants declining to introduce any evidence, the jury returned a verdict for plaintiff. Thereafter an order was entered granting defendants a new trial. Plaintiff has appealed.

Mr. N. A. Roterling, and Mr. S. T. HogevoU, for Appellant.

Mr. W. E. Carroll, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The motion for new trial was made on several of the statutory grounds, including insufficiency of the evidence to justify the verdict. The court sustained it by a general order, but attached to the order a memorandum stating, as its reason for granting the motion, that the evidence is insufficient, in that it "leaves it speculative and conjectural whether the explosion by which plaintiff was injured was due to a missed hole, for which defendants might be liable, or due to a piece of dynamite accidentally in the loose earth, and for which defendants are not liable." Contention is made by counsel for appellant that this court may consider this reason alone; and, if the court was in error in granting the motion, the order must be reversed, without regard to whether the evidence is insufficient in other particulars, or whether there were errors of law requiring the granting of a new trial. In *Menard v. Montana Central Ry. Co.*, 22 Mont. 340, 56 Pac. 592, the same contention was overruled by this court. The rule declared therein has been uniformly observed by this court. (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *Gillies v. Clarke Fork Coal Min. Co.*, 32 Mont. 320, 80 Pac. 370; *Fournier v. Couderd*, 34 Mont. 484, 87 Pac. 455; *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878; *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820;

Beach v. Spokane R. & W. Co., 25 Mont. 367, 65 Pac. 106.) As was stated in *Menard v. Montana Central Ry. Co.*, *supra*, the memorandum opinion of the trial judge is no part of the record. It may not, therefore, be looked to for the purpose of limiting the scope of the general order, or restricting the review of it by this court. The order is before us for review generally, upon the record presented to the district court; and, if it can be justified upon any of the grounds of the motion, it must be affirmed.

Under the allegations of his complaint, and the issues made thereon by the defendants' answers, it was incumbent upon plaintiff, in order to recover against the defendants Orman & Crook, to show that he was in their employ, and that the injury suffered by him was the result of a violation of their legal duty to use ordinary care to furnish him a reasonably safe place in which to work, or, what is the same thing, of their sending him to work in the frozen ground without having first exercised ordinary care to ascertain that there was no missed hole therein into which he might drive his pick and cause an explosion; for the negligence alleged is that these defendants knew of the missed hole, or by the use of ordinary care should have known of it, and with such knowledge put plaintiff to work where, in his ignorance of its existence, he was likely to pick into it and cause an explosion, to his injury. The theory upon which Moran is joined with them as defendant is that, he being in their employ, and Rumsey, his boss, having under his immediate direction and control the other employees, Moran is liable, together with his co-defendants, for any negligence toward the employees of which Rumsey was guilty. As to whether he, being the intermediate agent only, and not being charged personally with any omission of duty or primary negligence, is liable under the rule of *respondeat superior*, we express no opinion, since no reference is made to this feature of the case by counsel. In no event can he be held liable with Orman & Crook, except upon proof of the same facts necessary to fasten liability upon them. If he was not in their employ, he was solely responsible for the acts and omissions of Rumsey, and is liable for any injury caused by him to the plaintiff by reason of the negligence alleged.

Without considering any other ground of the motion, we think a new trial should have been granted on the ground that the evidence is insufficient to sustain the verdict, not only in the respect stated by the trial judge, but also in another essentially important particular. The plaintiff and his wife were the only witnesses who testified. The latter merely corroborated the plaintiff in his statement of the details of a conversation had by him with defendant Orman some time after the accident occurred.

As to how the accident occurred, and the cause of it, and the particulars showing by whom he was employed, the plaintiff testified as follows: "As to what Rumsey said when he put me to work there, he said the day before the holes had been drilled and blasted, loaded for powder or dynamite, and that it had been shot off. He expected that the ground was all broken up, ready for us to pick it up and shovel it out. Guy Melton was the man who was working with me. Before I went to work there, I asked Paul Rumsey if it was safe to go to work there, and Melton asked him if all the holes had been shot off there, and Rumsey said they had. Rumsey said they told him that six sticks had been put in the holes, and he said they were all exploded. Myself and the man working with me then proceeded to work, and we worked at that place seven or eight hours before anything happened; and we worked the entire forenoon without any accident occurring from the time we started, and in the afternoon I picked out a missed hole. This happened about 5 o'clock in the afternoon, and I was still working on that foundation, and we had removed between two and three feet, nearly three feet, perhaps a little more, from that particular place, and I was picking and digging it up, and picked into a missed hole. A missed hole is a hole that has not been shot off, and that is loaded with explosives. In the course of my employment about railroad grading camps I had not handled dynamite to any great extent, but I had handled some of it, and I know that it was dangerous. I had seen a little powder used in and around railroad camps, and I knew that powder was being used in this place on this culvert. This culvert was twenty-five feet long and eight feet wide; this hole that I was digging in, something of that size, and I had dug

about three feet off of the surface, between two and three feet. We started about 9 o'clock or a quarter to 9 in the morning, and we worked until about 5 o'clock in the afternoon when this accident occurred. * * * I did not see powder put into these holes. It was dynamite that they were using there, I believe. Rumsey said it was. He told me that the same morning I started to work. Previous to the 28th I had been working about a mile or so farther down the grade, digging and shoveling on the bank, and I asked Rumsey about this particular powder, because he was talking about it himself to the bunch of men. He said that he had sent two men out there to drill these holes and load them, to break the ground up so that it would be easy to dig and throw out, and one of them spoke out and said—one of them men who had been working there—how much they had used, and said there were six sticks or six pieces of dynamite put in each hole. There were nine holes loaded to break up this ground, and he said it was shot off the night before we went to work. He told us it had been shot off, and I asked him if it was all ready to go to work, and he said yes, and he said all the holes had exploded the night before; Rumsey said that himself. Rumsey knew that because the men go into camp in the evening and report; the men who he sets to load these holes and do this work. * * * I do not know whether anybody made any report the evening before to Paul Rumsey. I was picking and Melton was shoveling at the time, and that is the way I came to the conclusion that it was my pick that did the work. This hole or this dynamite, or whatever I struck, was a distance of three or four feet below the surface, as we originally started there; about that. I do not know of my own knowledge who put that dynamite there. I believe from the walking boss that it was dynamite. That is the only means I have of knowing of these matters; through the walking boss, or what he said to me. I was working for Moran and Orman & Crook. I was hired by those people shortly after the 15th of January, 1907." In detailing the conversation with Orman he said: "He told me he was sorry that my accident occurred on his contract, and that he would do all that he could do toward helping me get something on the road. He meant by

that a collection of money from the employees on the road.

* * * He did not say anything that implied to me, or stated to me, that he was liable for anything at all. * * * He spoke something about not being responsible in this matter, or his firm responsible, for the reason that I was engaged and employed by John Moran." On cross-examination he said: "Orman & Crook did not hire me, and John Moran never hired me.

* * * I have said that Orman & Crook did not employ me. nor did John Moran employ me." And again: "When Rumsey hired me, he did not tell me whether he was hiring me for Orman & Crook or Moran. I know who I was working for—I was working for Moran, and Rumsey hired me—hired me for Moran to work on Orman & Crook's contract on the railroad construction.

* * * Orman & Crook paid me. John Moran gave me a time check that I took to Orman & Crook and had it cashed. I was paid after I was in the hospital. My pay was brought to the office—brought to Orman & Crook's office, and I got Orman & Crook's check cashed, and the money was brought to me. I did not see the check because I was already blind. That check was never in my possession, but I have had other checks from Orman & Crook in my hands before I worked for Moran. I did not see the check with which Orman & Crook paid me, between January 15 and January 29. I don't think it was ever put into my hands, but the money itself was brought to me by my wife. Men working upon these various subcontracts put their time checks to Orman & Crook, who gave them another check; that only showed the time you worked. I don't know who signed that time check at Moran's camp. It was not Paul Rumsey. He was not the man who kept the time. It was not John Moran. Orman & Crook charged the money up to John Moran. It is a fact, and I so understood it at the time, that John Moran was merely a subcontractor there under Orman & Crook. That was the way I understood it, and that Orman & Crook had the larger contract for a great number of miles of railroad, which they had sublet to John Moran and others for construction; and I worked at Moran's camp No. 2. I understood that Paul Rumsey was the man who hired me. He was the walking boss, and John Moran

was the contractor looking after that particular portion of the work."

This evidence reveals the fact that the plaintiff did not know whether the explosion was caused, as he alleges, by his picking into a missed hole, or into a piece of dynamite which had failed to explode, and had thus been left in the loose earth, or had gotten into it by accident, or into a cap which had been dropped by the workmen on the day before. While he repeats the statement that he picked into a missed hole, his subsequent statement indicates that this amounts to a mere inference by him that there was a missed hole from the fact that there was an explosion, produced by a stroke of Melton's shovel, or his own pick, into some explosive after they had removed the dirt to a depth of three or four feet. There is no attending circumstance testified to tending to show that one of the charges placed the day before did not in fact explode, and to exclude an inference that the explosive, whatever it was, got into the loose earth by accident, oversight, or design, for which no one of the defendants was responsible. If it was a cap or a piece of powder dropped by one of the workmen, or a portion of a stick which had failed to explode, but was blown off and mixed with the loose earth, the accident was an unforeseen misfortune, for which no one can be held responsible, unless it was the legal duty of defendants to make inspection after each explosion to ascertain that all the powder placed in the holes had been consumed, and none of it blown out and mixed with the debris. Even so, recovery is sought here for the lapse of duty in failing to ascertain that there was a missed hole. It may be conceded that where the testimony introduced by the plaintiff, though mainly circumstantial, tends directly to support the plaintiff's case, and to exclude any inference that some other cause produced the injury, and there is no rebutting evidence, it would be an abuse of discretion to grant a new trial, yet, if the evidence does not meet this requirement, it fails to make out a *prima facie* case, and it becomes the duty of the court to grant a new trial, just as it should have sustained the motion for nonsuit in the first instance.

The rule applicable is stated thus in *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515: "The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory, or theories, inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negligence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury. If the testimony leaves either the existence of negligence of defendant, or that such negligence was the proximate cause of the injury, in conjecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven, it does not tend to prove them within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith." It has been approved by this court in the following cases: *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *McAuley v. Casualty Co.*, 37 Mont. 256, 96 Pac. 131; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243.

The motion for nonsuit should have been granted, for the reason that the evidence furnishes no substantial basis for the conclusion that the defendants were guilty of negligence. For the same reason a new trial was properly granted. It should have been granted also for the reason that the evidence wholly fails to sustain the allegation that the plaintiff was in the employ of Orman & Crook. So far as the statements of plaintiff tend to show any substantial fact in this connection, they lead to the conclusion that he was in the employ of Moran, who was an independent contractor, and not of Orman & Crook. If Moran was an independent contractor, and the plaintiff was in his em-

ploy, Orman & Crook cannot be held liable. Again, Moran cannot be held liable in this case, because it is not alleged that the plaintiff was employed by him.

The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

39	350
40	585

CITY OF BUTTE, RESPONDENT, v. MIKOSOWITZ, APPELLANT.

(No. 2,671.)

(Submitted June 16, 1909. Decided June 28, 1909.)

[102 Pac. 593.]

Ejectment—Cities and Towns—Streets—Establishment—Public Lands—Grants for Highways—Construction—Complaint—Sufficiency—Estoppel—Instructions—General Verdict—Effect.

Ejectment—Complaint—Sufficiency.

1. A complaint in ejectment by a city to recover possession of a strip of ground alleged to be a public street, which stated that the city was the owner of an easement in the property described, for street and highway purposes, that it was entitled to the immediate possession of the ground, and that defendant had taken possession of and was wrongfully withholding it, was sufficient.

Cities and Towns—Public Lands—Highways—How Established—Prescription.

2. Section 2477, U. S. Rev. Stats., grants a right of way for the construction of highways over public lands, but does not specify the method by which the roadway is to be established. *Held*, that any acts by which the public might acquire a public roadway over private property, other than by purchase, were sufficient to constitute an acceptance of the grant, and that therefore evidence that a city had used a strip of ground for twelve or thirteen years as a public roadway under such a grant was ample to establish a road by prescription.

Same—Public Lands—Grants—Relation Back.

3. An acceptance of a grant of public land for highway purposes, under section 2477, U. S. Rev. Stats., relates back to the date of the grant or dedication, and one taking such land after acceptance by a municipality, does so subject to the rights which the public has acquired.

Same—Streets—Building Permits—Estoppel.

4. Where a city had acquired an easement in public land for street purposes prior to the taking of such land by defendant, it could not be estopped to assert its right by the acts of its building inspector in issuing building permits to defendant, relying on which he claimed to have made valuable improvements on the land, and evidence to that effect was properly excluded.

Estoppel—Pleading—Evidence—Admissibility.

5. Unless an estoppel is properly pleaded, evidence of acts constituting it is inadmissible.

Same—Availability of Defense Against Public.

6. *Quære*: Is the defense of estoppel available as against the public or a municipality?

Cities and Towns—Streets—Width.

7. The court in awarding plaintiff city a strip of ground sixty feet in width, instead of confining the width to the beaten path, did not err, since the word "highways," as used by Congress in section 2477, must be construed in accordance with recognized local laws, customs and usages, and since section 1339, Revised Codes, provides that they must be sixty feet wide, unless otherwise ordered by the officers having control or supervision over them.

Same—Public Lands—Grants for Highways—Evidence of Use.

8. The grant of public land for highway purposes, made by Congress in section 2477, U. S. Rev. Stats., is to the public as a continuing body; therefore, as soon as territory over which a highway had been established under the grant became part of an incorporated city, the latter took the place of the county as the trustee of the public in supervising and controlling it, and the court did not err in admitting evidence of the use made of the strip of ground mentioned in the above paragraphs, prior to the time the land was first included within the city limits.

Same—Instructions—Assumption of Fact—Harmless Error.

9. Though an instruction that both plaintiff and defendant derived title to the ground in controversy between the city and defendant, from the government, was erroneous as an assumption of fact in dispute, the error was harmless where in subsequent portions of the charge the jury was given to understand that both parties "claimed" title from the same source.

Same—General Verdict—Effect.

10. Defendant not having submitted any special interrogatories upon the question whether the city's right of action was barred by the statute of limitations, he was bound by the general verdict in plaintiff's favor upon all the issues.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by the City of Butte against Joseph Mikosowitz.
Judgment for plaintiff, and defendant appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

It will be claimed by the plaintiff that it has a right of way by prescription, under the statutes of the United States, but

that character of a claim is not pleaded in the complaint. Even if it was permitted to introduce evidence in support of that claim, the evidence is insufficient to establish its right as claimed, for that character of a right cannot be claimed over land situated as this was, and passed over by the people in all directions as well as the surrounding land being so passed over. (*Coburn v. San Mateo Co.*, 75 Fed. 532; *Warren v. President etc. of Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610; *State v. Horn*, 35 Kan. 717, 12 Pac. 148; *Bushy Mound, Town of, v. McClintock*, 150 Ill. 133, 36 N. E. 976; *Rose v. City of Farmington*, 196 Ill. 226, 63 N. E. 631; *Engle v. Hunt*, 50 Neb. 358, 69 N. W. 970; *Gulf Ry. Co. v. Montgomery*, 85 Tex. 64, 19 S. W. 1015.)

The court erred in overruling the defendant's motion to dismiss the action. In this nature of an action the delay was such as to be fatal to the plaintiff. The defendant was under no obligation to take any step in the matter. (*Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971; see, also, *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704; 14 Cyc. 443-445, and cases cited in notes, 96 et seq.)

It has been held that an action in ejectment will not lie for the possession of what is claimed by the plaintiff. (*Wood v. Truckee Turnpike Co.*, 24 Cal. 474.)

Mr. E. S. Booth, Mr. W. E. Carroll, and Mr. E. M. Lamb, for Respondent.

Upon the question of the right of the city to maintain ejectment, see 10 Am. & Eng. Ency. of Law, 2d ed., 475; 15 Cyc. 27; *San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127, 41 L. R. A. 335; *Ocean Grove C. M. C. v. Berthall*, 63 N. J. L. 312, 43 Atl. 887; *Cleveland v. Cleveland R. Co.*, 93 Fed. 113; *St. Louis v. Missouri Pac. Ry. Co.*, 114 Mo. 13, 21 S. W. 202; *South Amboy v. New York Ry. Co.*, 66 N. J. L. 623, 50 Atl. 368; Elliott on Roads and Streets, 2d ed., p. 456. "Where the public have acquired the right to a public highway by user, they are not limited in width to the actual beaten path. The right carries with it such width as is reasonably necessary for

the public easement of travel and the width must be determined from the facts and circumstances peculiar to each case." (*Grossbach v. Brown*, 72 Wis. 458, 40 N. W. 494; *Whiteside v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032; citing *Burrows v. Guest*, 5 Utah, 91, 12 Pac. 847.)

It is an established maxim, "Once a highway always a highway," for the public cannot release their right and there is no extinctive permission or prescription. Even forty years non-user has been held insufficient to divest the public of the right to open and use the nonused portion of a public street whenever the exigencies of travel required it. (*London v. Oakland*, 90 Fed. 691, 33 C. C. A. 237; Elliott on Roads and Streets, 2d ed., p. 970.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in the nature of ejectment, by the city of Butte against Joseph Mikosowitz, to regain possession of a strip of ground alleged to be a public street. The defendant, in effect, denies that the ground is, or ever was, a public street or highway, or that the city owns an easement over the land for street purposes. By way of an affirmative defense the defendant alleges that he is the owner, in possession, and entitled to the possession, of the Lucky Boy quartz lode mining claim, a portion of which is claimed by the city for street purposes; that the plaintiff has heretofore at all times admitted and acknowledged defendant's ownership and right of possession; that in order to erect buildings within the city limits, it is necessary to secure from the city authorities building permits; that the city has granted to the defendant building permits under which he has erected four dwelling-houses upon the premises in dispute; that such buildings were erected with the full knowledge and consent of the city and its officers; that such buildings are of a permanent character, and are occupied by the defendant and his tenants; and by reason of these facts the city is, and of right ought to be, estopped from asserting any claim whatever

to the disputed ground. These affirmative allegations were put in issue by reply. The jury returned a special finding and a general verdict in favor of the city, and judgment was entered thereon, from which judgment and an order denying him a new trial, the defendant appeals.

Appellant's brief contains sixty-seven specifications of error, but to consider each separately would extend this opinion beyond any reasonable bounds. Many of the specifications relate to the reception and rejection of evidence; and, with the exceptions hereafter noted, these may be disposed of by saying that, after a careful consideration, we have reached the conclusion that the court did not err in any of its rulings with relation thereto.

The complaint alleges that the city is the owner of an easement for street and highway purposes; describes it; asserts that the city is entitled to the immediate possession of the ground; and that the defendant has taken possession of and wrongfully withholds the same. These allegations are sufficient. (*Billings v. Sanderson*, 8 Mont. 201, 19 Pac. 307; *Payne v. Treadwell*, 16 Cal. 221; 7 Ency. of Pl. & Pr. 336.)

The ground in controversy is claimed by the city as a part of Jackson street. Prior to 1888 this strip of ground was parallel with, and immediately adjoining, the western limits of the original townsite of Butte, and was a part of a considerable area of open public land of the United States. The city relies upon the congressional grant or dedication contained in section 2477, United States Revised Statutes (Act July 26, 1866, Chap. 262, sec. 8, 14 Stats. 253 [U. S. Comp. Stats. 1901, p. 1567]), which provides: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This Act was approved July 26, 1866. It is contended by the city that the public accepted this grant or dedication, so far as the same is applicable to the strip of ground in dispute, by using the ground as a public roadway from 1883 or 1884 continuously, until 1895 or 1896, when such use was interrupted by the acts of the defendant and his predecessors in interest. We think the evidence offered on behalf of the city,

touching the character and extent of the use made of the disputed ground, was ample to go to the jury. In answer to a special interrogatory the jury found that the strip had been used by the public generally as a roadway for five years or more, prior to July 1, 1895. The evidence was sufficient to establish a road by prescription, if the land over which it passed had been the subject of private ownership. The purpose of the congressional grant or dedication is to enable the public to acquire a roadway over public lands. The method by which the roadway is to be established is not specified; and it must be held, therefore, that the Congress intended that any acts by which the public might acquire a public roadway over private property, other than by purchase, would be sufficient to constitute an acceptance of this grant or dedication. It is then a rule, recognized by the land department and by the supreme court of the United States, that whenever a grant or dedication is accepted, such acceptance relates back to the date of the grant or dedication, and anyone who takes the land after the acceptance of the donation does so subject to the right which the public has acquired. These principles are well established. A few of the leading authorities only need be cited: *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793; *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667; *Wells v. Pennington County*, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; *McRose v. Bottyer*, 81 Cal. 122, 22 Pac. 393; *Streeter v. Stalnaker*, 61 Neb. 205, 85 N. W. 47.

The court first admitted, and then withdrew from the consideration of the jury, certain building permits issued by the building inspector of Butte to the defendant and his agents, by virtue of which, it is contended by defendant, he made valuable improvements on the disputed strip of ground. We think the ruling of the court correct. If the city had acquired an easement for public street purposes prior to 1895, its right could not thereafter be prejudiced by the act of a subordinate city officer, even if he had attempted to do so. But in these several instances we observe that the building inspector very carefully guarded the city's interests, and at the same time put the de-

fendant on notice of the city's claim; for in permits A, B, and E, respectively, the permission granted is to erect a building on the Lucky Boy lode claim, "facing Jackson street." According to the defendant's contention, there never has been any Jackson street, or other street, at that particular locality, while the claim of the city has been that Jackson street passes over this ground designated as the Lucky Boy lode claim. So that, if these permits had been retained in evidence, they could have served no other purpose than to prejudice defendant's claim. The permission was given to erect buildings facing Jackson street, not to erect buildings in Jackson street. Each of the other two permits refers to a building facing on Porphyry street, and neither one appears to have any evidentiary value in this case in any event.

Upon the trial the defendant offered in evidence the records of a former action commenced by the city against this defendant, also an agreement between the city and the predecessors in interest of the defendant under which a sewer was constructed by the city, and finally offered to prove that the city has assessed to, and collected taxes from, the defendant on the very ground in dispute. These offers were refused. In his brief counsel for appellant says: "We cannot conceive of a situation where the city, by its ordinance and its complaint filed in court, admits the ownership of the defendant, where it obtained for a consideration permission to put a sewer through the property, • • • and where it assessed and collected taxes from the premises, that it is not estopped by such conduct." Whatever merit there might be in this argument under different circumstances, there is not any here. One of the defenses relied upon was estoppel, but the only act pleaded by way of estoppel was the issuance of the building permits. There is not anything said in the pleadings about the former action, or the payment of taxes, or the sewer contract, and all this evidence was properly excluded as without the issues made by the pleadings. This was not a case wherein the defendant did not have an opportunity to plead the estoppel, or wherein the facts constituting the estoppel were not known to him until the trial, or in which the

city had pleaded the facts, or had offered evidence upon the subject. Therefore the rule is settled beyond controversy that, in order to introduce evidence of acts constituting an estoppel, there must be a sufficient pleading. (*Eisenhauer v. Quinn*, 36 Mont. 368, 122 Am. St. Rep. 370, 93 Pac. 38, 14 L. R. A., n. s., 435; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994.) We have proceeded thus far upon the assumption that the defense of estoppel, if properly pleaded, would be available as against the public or a municipality. There is, however, some question as to this (*Elliott on Roads and Streets*, 2d ed., sec. 884); but it is not necessary to pursue the inquiry further here.

Complaint is made that the judgment awarded the city a strip of ground sixty feet in width, and does not confine it to the beaten track or path. But we do not think there is any merit in this contention. In using the term "highway" the Congress must have intended such a highway as is recognized by the local laws, customs, and usages; and, since in this state public highways generally are sixty feet in width (*Rev. Codes*, sec. 1339), the court did not err in its judgment in this respect (*Burrows v. Guest*, 5 Utah, 91, 12 Pac. 847).

It is also contended that the court erred in admitting evidence of the use made of the strip of ground by the public prior to 1888, when this territory was first included within the city limits. This argument proceeds upon the assumption that, if a roadway was established prior to that date, it was a county road, as distinguished from a street. But, assuming this to be the fact, the conclusion which defendant draws is not warranted. The grant or dedication by the Congress is to the public, and the public is one continuing body. So long as the roadway remained a rural one, the county had supervision and control thereof as trustee for the public; but, as soon as the territory over which the road runs came within the limits of the incorporated city, the city then became the trustee of the same public in supervising and controlling the highway.

In instruction No. 3 the court told the jury that both plaintiff and defendant derived title to the ground in dispute from the government. The court might more properly have said,

"each party claims title from the government"; but, since the court so thoroughly explained its meaning in subsequent portions of the instructions, it appears to us impossible that defendant could have been prejudiced by this apparent assumption of a fact which was in dispute.

It is also contended that the city's right of action, if any it has had, is barred by the statute of limitations. There is some conflict in the evidence as to when the public travel was interrupted, whether before or after July 1, 1895, the date when the Codes became effective. Prior to that date the period of the statute was five years; since that time it is ten years. If the interruption did not occur until after July 1, 1895, then this action was commenced in time. The general verdict is a finding in favor of the city upon all the issues, including this one; and, since the defendant did not submit any special interrogatories bearing upon this subject, he must be bound by the general finding against him.

We do not think the other specifications require notice in detail. The conclusion we have reached appears to us to effectuate substantial justice between these parties. If the defendant in good faith procured the Lucky Boy lode claim under the mineral laws, he did so presumptively for the value of the minerals contained beneath the surface, and there does not appear to be any reason why he may not prosecute the mining operations without interference with the plaintiff's right to use the street. If, however, he procured this ground under the pretense that it was mineral land, merely to occupy the surface for building purposes, then he is not entitled to any consideration.

There does not appear to us to be any substantial error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

TOOLE, RECEIVER, PLAINTIFF, v. WEIRICK ET AL., DEFENDANTS; MYERS, APPELLANT; GILCHRIST, RESPONDENT.

(No. 2,682.)

(Submitted June 15, 1909. Decided June 28, 1909.)

[102 Pac. 590.]

Mortgages—Redemption—Tender—Waste—Interest—Accounting—Use and Occupation—Rents—Liability of Mortgagee—Briefs—Specifications of Error—Review.

Mortgages—Deeds Absolute—Redemption—Tender.

1. Where a deed, absolute on its face, had been declared a mortgage, and the amount due was unliquidated and uncertain, the debtor in a subsequent suit to redeem was not required to plead a tender.

Same—Waste—Liability of Mortgagee.

2. A mortgagee of real property is chargeable for waste committed by him on the premises while in his possession, including the permanent depreciation in the property caused by his failure to make necessary or proper repairs, or resulting from the reckless or improvident management of it by himself or his tenant.

Appeal and Error—Specifications—Briefs—Review.

3. Error pointed out in appellant's brief but not based upon any specification of error will not be considered on appeal.

Trial by Court—Decision—Time of Rendition—Directory Statute.

4. Section 6763, Revised Codes, providing that upon a trial of a question of fact by the court, its decision or findings must be filed within twenty days after submission of the case, is directory only, and its failure to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date.

Mortgages—Redemption—Interest Allowable.

5. After decree in a foreclosure suit the mortgage debt became merged in the judgment, and in a subsequent action, looking to the redemption of the property, interest was properly allowed at eight per cent per annum. (Revised Codes, sec. 5214.)

Same—Redemption—Accounting—Use and Occupation—Rents.

6. While a mortgagee who personally retains possession of the mortgaged premises, or who, when not in actual possession, does not exercise reasonable care in selecting an agent to look after it, or whose agent fails in this respect, is chargeable on redemption with the reasonable value of the use and occupation thereof, to the amount of its fair rental value for the period, he is chargeable only with rents actually received where he depends on the interposition of an agent in the selection of whom reasonable care was exercised and who likewise exercised such care to keep the property rented at a fair rental.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

SUIT by George Toole, receiver, against E. B. Weirick, Elizabeth C. Myers, and others to quiet title to land. From the decree rendered, Elizabeth C. Myers appeals. Modified and remanded.

Messrs. Breen & Hogevoell, and *Mr. N. A. Rotering*, for Appellant.

There was no offer on the part of Gilchrist to do anything, and that is one of the prerequisites for persons coming into court, demanding that a deed, absolute on its face, be decreed to be a mortgage; they must be willing to do equity. (*Mack v. Hill*, 28 Mont. 100, 72 Pac. 307; *Cowing v. Rogers*, 34 Cal. 648.) A plea of tender, to be good, must show that the sum tendered was sufficient to discharge the debt. (*Bailey v. Trozell*, 43 Ind. 432.) To entitle a pledgor to return the pledges, his tender must consist of both principal and interest. (*Woodworth v. Morris*, 56 Barb. (N. Y.) 97.) A tender which does not include the interest is insufficient. (*McClenden v. West*, 20 S. C. 514.) Such a tender must be an actual tender and not a mere offer. (*Babcock v. Perry*, 8 Wis. 277.) A tender is not a legal tender if it offers to pay a certain amount and interest less certain damages. (*State v. Case*, 14 Mont. 520, 533, 37 Pac. 95.) The tender must be a continuing one, and a plea of tender without alleging that the pleader is always ready and willing to tender the same is not sufficient. (*Caruther v. Williams*, 21 Fla. 485.)

The court erred in not fixing a definite time within which the property should be redeemed. (*Taylor v. Dillenberg*, 168 Ill. 235, 48 N. E. 41, 43; 27 Cyc. 1862, 1854; *Burgess v. Ruggles*, 146 Ill. 506, 34 N. E. 1036; *Pitman v. Thornton*, 66 Me. 469; *Goodenow v. Curtis*, 33 Mich. 505; *Hollingsworth v. Campbell*, 28 Minn. 18, 8 N. W. 873; *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433; *Winchester v. Paine*, 11 Ves. Jr. 194, 8 Rev. Rep. 131.)

Section 6838, Revised Codes, provides that interest on redemption is one per cent per month; such a statute controls the rate of interest. (*Evans v. Rhode Island Hospital Trust Co.*, 67 Minn. 160, 69 N. W. 715; *Clark v. Finlon*, 90 Ill. 245, 248.)

Mr. W. D. Kyle, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On September 3, 1898, Jeremiah Hore executed and delivered to Elizabeth C. Whitney (now Elizabeth C. Myers) a conveyance in form a deed, by which he transferred to her lot 10, block 6, of Bernard's addition to Butte. Thereafter an action was commenced by Hore against Whitney to have the deed declared to be a mortgage. Upon the trial of that case special interrogatories were submitted and answered, and these findings adopted. The court decreed the deed to be a mortgage, and found that the net indebtedness from Hore to Whitney, secured by the mortgage, was \$1,785.13. This decree was entered on October 20, 1903, but for some reason Hore did not tender the money or receive the deed back for the property. Some time thereafter M. P. Gilchrist commenced an action to foreclose an attorney's lien upon lot 10. He made Elizabeth C. Myers a party defendant, and she filed an equitable counterclaim for the foreclosure of the mortgage mentioned in *Hore v. Whitney*. Upon the trial of that cause, the court found that there was then (December 20, 1905) due to Mrs. Myers the sum of \$1,616.06 after charging her with certain rent, which amount was declared to be a lien upon lot 10, superior to the lien of Gilchrist. A decree of foreclosure was duly made and entered, which directed the sale of the property and the proper application of the proceeds. From that decree Mrs. Myers appealed to this court, with the result that the cause was remanded to the district court with directions to proceed to determine the amount of rent with which Mrs. Myers was properly chargeable. (*Gilchrist v. Hore*, 34 Mont. 443, 87 Pac. 443.) Pursuant to the directions of this court, the district court heard evidence, and thereafter modified the decree of December 20, 1905, to read that the amount then due Mrs. Myers was \$2,357.76. For some reason not apparent, there was not anything further done. A sale under the decree was not made, but Mrs. Myers continued in possession of

the property. In the meantime Hore gave a deed to Gilchrist, by which he conveyed whatsoever interest he had in lot 10 to Gilchrist. In 1907 George Toole, as receiver of the estate of William B. Jenkins, a bankrupt, brought this present suit to quiet title, alleging that Jenkins' estate owned lot 10. Mrs. Myers, Gilchrist, and others were made defendants. By an equitable counterclaim, Gilchrist set forth the former proceedings, and asked that he be permitted to redeem lot 10, alleging that the reasonable value of the use and occupation of the property by Mrs. Myers from December 20, 1905, was \$2,200, and that she had committed waste on the property to the extent of \$500. In an answer to this counterclaim, Mrs. Myers denied many of the allegations made by Gilchrist, and alleged affirmatively that there was then due her upon her mortgage the sum of \$2,681. The cause was tried in October, 1907, and taken under advisement by the court, which thereafter, in June, 1908, made its findings of fact and conclusions of law and ordered a decree, which was entered. The court accepted the statement in the decree of December 20, 1905, as amended, for the amount then due Mrs. Myers, but erroneously stated the amount to be \$2,351.76 instead of \$2,357.76, computed interest thereon at the rate of eight per cent per annum to the date of the decree, gave Mrs. Myers credit for taxes paid, in all amounting to \$2,890.29, and then charged her with the reasonable value of the use and occupation of the property from January 9, 1906, to the date of the decree, at the rate of \$65 per month, amounting to \$1,917.50, and also charged her with \$100 for waste committed on the property, leaving the net amount due her upon her mortgage, \$976.98, and provided in the decree for a redemption of the property by Gilchrist upon his paying to Mrs. Myers that amount. From this judgment and an order denying her a new trial Mrs. Myers appealed.

We have encountered great difficulty in attempting to determine just what matters are urged upon us for determination. Many questions are propounded in the brief of counsel for appellant, but some of these at least are not raised by the specifications of error, and some of the specifications assigned are not

argued, or, if argued at all, are considered with others in such manner as to destroy their identity. We have endeavored to consider all questions which appear to us to be properly before us.

1. Some of the questions suggested by counsel have been set at rest by the former proceeding. For instance, the ownership of this property is not open to further inquiry. That question was determined in *Hore v. Whitney*. It was there decided that Hore owned the property and that Mrs. Whitney (now Mrs. Myers) had only a mortgage upon it, and that judgment is conclusive upon the question of ownership.

2. While there are some cases holding that in a bill to redeem it is necessary to allege a tender, this is not the general rule. It is generally held sufficient that the bill discloses a readiness and intention to pay the amount found due. This is the effect of the decision in *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307, and is the rule announced in 17 Ency. of Pl. & Pr. 965, and 8 Current Law, 1042. The function of a suit to redeem is to adjust the equities of the parties (8 Current Law, 1041); and, where a deed absolute on its face is decreed to be a mortgage, some kind of an accounting is usually necessary, and, because of this fact, it is generally impossible for the party seeking to redeem to make a tender, since the amount due is unliquidated and uncertain. This is true of the suit before us. If Gilchrist had assumed to make a tender, he would have been altogether uncertain as to the amount to be tendered. The rule is well stated in 27 Cyc. 1855, as follows: "Where the bill for redemption is framed on the theory that the mortgage debt or some portion of it is still due, it must contain a tender or offer to pay the sum so admitted. If the amount due is unliquidated or disputed, it is sufficient to offer to pay such sum as the court shall find or determine to be justly due, or whatever sum may be found to be due upon taking and stating the account between the parties; and no such offer is necessary where plaintiff alleges that defendant has been already overpaid out of the proceeds of the property."

3. It is contended that the court was in error in charging Mrs. Myers with waste; but we think the court's holding correct. It is a general rule that "a mortgagee is chargeable for waste committed by him on the premises while in his possession, including the permanent depreciation in the property caused by the failure to make necessary or proper repairs, or resulting from the reckless or improvident management of the property by himself or his tenant." (27 Cyc. 1838.)

4. Complaint is made in the brief that there was not any allowance made to Mrs. Myers for repairs, improvements, insurance, or for her services in caring for the property. But our attention is not directed to any evidence upon these matters which was excluded, or any offer of proof which was refused. Of course, if the court excluded the evidence, it could not find upon these questions. But there are not any specifications of error directed to the refusal of the court to hear testimony upon any of those questions. If any errors were committed with respect to any or all of these matters, it was the duty of counsel to point out such errors to this court; for it is not the duty of this court to search the record for errors. We commence our investigation of every appeal with the presumption that the trial court did not err.

5. Section 6763, Revised Codes, provides: "Upon a trial of a question of fact by the court, its decision or findings must be given in writing and filed with the clerk within twenty days after the case is submitted for decision." This cause was submitted to the court in October, 1907, but the decision of the court was not rendered until June following. It is earnestly contended that the equitable counterclaim of defendant Gilchrist should have been dismissed because of the failure of the trial court to observe the provisions of the section quoted above; but this would be a manifest injustice. The litigant is not responsible for the failure of the court to perform its duty. If Mrs. Myers had desired action upon the matter at an earlier date, this court was open to her to apply for a writ of mandate to compel the district court to decide the case. California and Utah each has a statute similar to our section 6763 above, and

in each state it has been held that the statute is directory, and the failure of the court to render its decision within the time limited does not deprive the court of jurisdiction to decide it at a later date (*McLennan v. Bank*, 87 Cal. 569, 25 Pac. 760; *Lynch v. Coviglio*, 17 Utah, 106, 53 Pac. 983), and we think this conclusion correct.

6. It is suggested in the brief of counsel for appellant that the court did not compute interest upon Mrs. Myers' debt at the correct rate; but, when the judgment of December 20, 1905, was rendered, her debt was merged in the judgment, and the judgment draws interest at the rate of eight per cent per annum (section 5214, Revised Codes), and this appears to have been the rate considered by the court.

7. It is a rule of well-nigh universal recognition that, "on redemption from a mortgage under which the mortgagee has acquired and retained possession, he must account and give credit for the rents and profits of the premises during the period of his occupation, and it is immaterial whether he holds under a formal mortgage or under a deed absolute in form but intended as a security." (27 Cyc. 1878.) But the extent to which this rule is to be carried is involved in some obscurity. However, after a somewhat extended review of the authorities, we think the doctrine most harmonious with reason and equity is that: "If the mortgagee personally retains possession of the mortgaged premises, he will be chargeable on his accounting with the reasonable value of the use and occupation thereof, amounting to the fair rental value of the premises for the period." (27 Cyc. 1841.) This same rule applies if a mortgagee, though himself not actually in possession, does not keep an accurate account of the rents received and is guilty of such misconduct as to make a resort to this rule equitable, or if such mortgagee has not exercised reasonable care in selecting an agent to look after the property, or if, having exercised due care in selecting an agent, the agent does not exercise reasonable care to keep the property rented. But, on the other hand, if the mortgagee by reason of his absence or other excuse is not personally in possession of the property, but depends upon the interposition of an agent, and

if in selecting such agent the mortgagee exercises due care, and if then such agent further exercising reasonable care to keep the property rented at a fair rental, then the mortgagee will be chargeable with rents actually received, and not with the value of the use and occupation of the property. These rules seem to have the support of the authorities. (2 Jones on Mortgages, 6th ed., sec. 1122; 27 Cyc. 1841; *Moshier v. Norton*, 100 Ill. 63; *Gerrish v. Black*, 104 Mass. 400; *Montague v. Boston etc. R. Co.*, 124 Mass. 242.)

This record discloses that Mrs. Myers lives in California, and also employed an agent in Butte to look after this property. The evidence does not disclose that her occupancy of the property was wrongful, so as to bring her within the operation of the rule announced in section 6069, Revised Codes. However, in computing the amount of rent with which Mrs. Myers was chargeable, the trial court adopted the rule of the value of the use and occupation of the property, and that, too, without regard to the care exercised by Mrs. Myers in having the property managed. In this we think the court erred.

A new trial of all of the issues does not seem to be necessary, and the motion for a new trial will be denied. The cause is remanded to the district court, with direction to determine the amount of rent with which Mrs. Myers is properly chargeable, according to the views herein expressed, to compute the interest upon \$2,357.76, instead of \$2,351.76, and to further modify the decree by limiting the time within which the respondent Gilchrist shall effect a redemption, and the time ought not to exceed ninety days from the time the decree is finally entered as modified. When the court has finally determined the amount of rent with which Mrs. Myers is properly chargeable, it will then modify the judgment according to the suggestions here made. Remanded for further proceedings.

Remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied, October 22, 1909.

WATKINS, APPELLANT, v. WATKINS, RESPONDENT.

(No. 2,685.)

(Submitted June 10, 1909. Decided July 3, 1909.)

[102 Pac. 860.]

39	367
39	494
39	367
41	9
41	141
41	204
41	453
41	555
39	367
40	565

Suits in Equity—Findings—Insufficiency of Evidence—Extent of Review—Quieting Title—Conveyances—Forgery—Evidence—Admissibility—Hearsay—Instructions.

Equity—Findings—Insufficiency of Evidence—Extent of Review.

1. In reviewing an assignment that the evidence is insufficient to warrant the findings in an equity case, the supreme court will go no further than to determine whether there is a decided preponderance in the evidence against them, and if upon examination of the testimony such preponderance is not found, they will not be disturbed.

Appeal and Error—Assignments—Review.

2. Only those assignments of error which are argued in the brief will be considered on appeal.

Equity—Evidence—Admissibility.

3. In a suit to quiet title to lands alleged to have been conveyed by defendant to his divorced wife, proof as to who paid the taxes on the property after the alleged conveyance, claimed by defendant to have been a forgery, was competent as tending to show the reasonableness or unreasonableness of plaintiff's claim.

Same.

4. Defendant in the suit referred to in the above paragraph was properly permitted to answer the question why he made an application to reduce the amount of alimony awarded his wife. The testimony was competent as tending to show the feelings existing between the parties prior to and at the date of conveyance, and the probability or improbability of the transfer by defendant of all his property to plaintiff.

Same—Evidence—Hearsay.

5. Testimony of third persons as to what an employee of defendant had said concerning certain checks introduced in evidence was inadmissible as hearsay.

Same—Instructions—Review.

6. The findings of the jury in an equity case being advisory only, alleged error in instructions to the jury will not be reviewed.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Frances C. L. Watkins against George S. Watkins. From a judgment for defendant, plaintiff appeals. Affirmed.

Mrs. Ella Knowles-Haskell, for Appellant.


Mr. W. A. Clark, and Mr. C. B. Nolan, for Respondent.

HONORABLE JOHN B. McCLERNAN, a judge of the Second Judicial District, sitting in place of MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

This action was brought to quiet title to a parcel of land, and water rights appurtenant thereto, situated in Madison county. The action was commenced in Madison county, and, upon motion for change of place of trial, the cause was transferred to, and tried in, Lewis and Clark county, before the district court, assisted by a jury. The action is one in equity, and the services of a jury could, very properly, have been dispensed with. In such a case, we are concerned with the action of the trial court, rather than with the action of the jury.

The complaint contains the usual allegations of ownership, right of possession, etc., and of an adverse claim by the defendant, which is declared to be without foundation, and concludes with a prayer for a decree quieting plaintiff's title. The complaint also contains an allegation to the effect that the source of plaintiff's title is a certain written instrument, of which the following is a copy:

"Watkins Ranch, Sat. Sep. 20th, 1902.

"For the consideration of one hundred dollars paid in cash, and two hundred dollars to be paid per annual March and September of each year during my lifetime I agree and do convey to Frances C. L. Watkins and heirs, all of my real estate together with all water and water rights to said property, and all farm machinery and hay together with all personal property on said premises, situated in the county of Madison, state of Montana, all horses branded thus—WL, 6, all cattle branded thus—GW, J, H, .

"GEO. S. WATKINS. [Seal.]

"Witness: IRENE WATKINS."

The plaintiff claims that this instrument was made, executed, and delivered by defendant to plaintiff on the day of its date. The defendant, by his answer, makes certain admissions, which, for the purposes of this opinion, it is unnecessary to enumerate, and makes specific denials, among which is a denial of the al-

legation that on the twentieth day of September, 1902, or ever or at all, he made, executed, or delivered to plaintiff the instrument in writing above set forth. The issue thus framed squarely presents the question as to whether the signature to the said instrument is the genuine signature of the defendant, or is a forgery; and, in fact, this is the fundamental question in the case.

The jury in the court below, by its findings, said that the defendant did not sign the instrument; that he was not paid, nor did he receive thereon, the sum of \$100; and that he was not paid, nor did he accept thereon, in March, 1903, the sum of \$100. These findings were, on motion of the defendant, adopted by the court, and a motion by plaintiff to reject them was denied. A motion by plaintiff for a new trial was made and denied, and judgment entered in favor of the defendant, from which judgment and the order denying the motion for a new trial this appeal is prosecuted. The court is now asked to set aside the findings of the jury and to reverse the judgment, upon the ground and for the reason that the evidence is wholly insufficient to justify the findings and decision of the trial court. This is the substance of the appellant's first assignment of error. It is true that appellant's brief contains references to cases containing the true rule laid down by this court as to the extent of review required of it in equity cases by the laws of this state. (Revised Codes, sec. 6253.) It also contains suggestions to the effect that a mere preponderance of evidence against them is sufficient to warrant the setting aside of the findings and the reversal of the judgment, and the oral argument of appellant's counsel seemed to us an attempt to support these suggestions.

The question with which this court is directly and primarily concerned is: Does the record show a decided preponderance in the evidence against the findings of the jury or the trial court? And not: Is the signature a forgery? It may be considered as settled in this jurisdiction that, in equity cases, this court in its review will go no further than to determine whether

there is a decided preponderance in the evidence against the findings of the jury or the trial court. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565.) The preponderance must be so clear and decided that this court can say, without resorting to surmise, speculation or conjecture, that, after making due allowance for the fact that the witnesses were present before the trial court and jury, the weight of the evidence is so pronounced against the findings that no fair or reasonable view of the evidence could have been adopted by the court or jury upon which to base its findings, and that this court entertains a definite opinion in that respect.

In reviewing the evidence, this court will start out with the presumption that the jury and the trial court did their whole duty and that the findings are supported by the evidence. It will then endeavor, by a fair, unprejudiced, and dispassionate examination of the evidence, to determine whether there is any substantial support for the findings in the evidence, always bearing in mind that it is not assisted by the presence of the witnesses, and that a witness' manner and demeanor on the stand might justify a conclusion by court or jury not at all warranted by a review of the evidence reduced to cold print. If, acting under the guidance of the rule here laid down, we determine that the testimony furnishes reasonable ground for different conclusions, then we will hold that there is no decided preponderance in the evidence against the findings, and decline to disturb them. In the case of *Finlen v. Heinze*, *supra*, this court said that "it is incumbent upon the appellant to show that the preponderance of the evidence is against the findings of the trial court, before we will disturb such findings upon the ground of insufficiency of the evidence." A careful reading of the whole case will convince anyone that the court was referring to a clear and decided, and not a mere, preponderance. In passing, we may say that we are convinced that every reason urged in favor of the policy of noninterference by the appellate court with the findings of the trial court,

except where there is a decided preponderance in the evidence against such findings, applied with equal, if not greater, force to the findings of a jury.

Tested by the rule here laid down, should this court disturb the findings of the jury and the trial court in this case? As this general rule must be applied as best it may to the facts of each particular case, we deem it unnecessary and useless to set out at length in this opinion an extended analysis of the evidence. The record of it is too voluminous to permit even of condensation, and presents a state of affairs that the courts may never again be called upon to consider. Under the circumstances existing here, we think it sufficient to say that we have carefully read all of the evidence; and, after giving careful and, as we believe, proper consideration to the peculiar nature of the instrument relied on by plaintiff, which purports to convey to the plaintiff all the real and personal property of the defendant in Madison county, of the value, approximately, of \$50,000 over and above encumbrances; the circumstances attending its execution; the relations toward each other existing between the parties at the time of, and for twelve years preceding, the execution of the instrument; a careful comparison of the signature to the instrument with many signatures of the defendant admitted to be genuine; the manner of the witnesses, as far as the same can be gleaned from the record; the apparent conflict, to some extent, between the oral evidence and statements contained in letters; contradictory statements of witnesses, which, to our minds at least, are not satisfactorily explained; the straightforward accusations and direct and emphatic denials of the same; and the less prominent features of the evidence generally, we cannot say that the clear or decided preponderance, or even a mere preponderance, of the evidence is against the findings of the court or jury, or that the testimony, viewed in the light of the attending circumstances, as nearly as this court can do so, does not furnish reasonable grounds for different conclusions.

Appellant's brief contains many assignments of error, but only a few of these assignments can be said to be argued, and

only those argued will be treated in this opinion. We have already disposed of the first assignment of error. The second one is that the court erred in not sustaining plaintiff's objection to the following question, addressed to George Watkins, son of plaintiff: "Who, if anybody, has paid the taxes down to the present time?" Plaintiff and defendant, divorced husband and wife, with their children were occupying the Watkins ranch, the subject of this action, but were living apart from each other. Anything which tends to show the reasonableness or unreasonableness, the probability or improbability, of the plaintiff's claim is competent. Upon this theory alone, if no other, we think the question was proper, as the exercise of control over the property would have a tendency to enlighten the court and jury.

The third assignment is that the court erred in overruling plaintiff's objection to the following question: "How was it that you came to make the application to reduce the alimony?" addressed to the defendant. Also, in overruling plaintiff's motion to strike out the answer to the question. We think the question was competent, as tending to show the feelings existing between the parties toward each other prior to and at the date of the instrument of conveyance, as the probability or improbability of the defendant, at the age of seventy years, transferring all his property to the plaintiff might, to some extent at least, be determined by the friendly or strained relations between the parties, as the case might be.

The next assignment of error we shall notice as having been argued to some extent by counsel, with vigor, but, as we think, with little force, is that the court erred in sustaining the objection of the defendant to the following question: "I wish you would state what Walter Holloway said when the checks were alluded to." Also, in sustaining defendant's objection to the following question: "I will ask you to state whether or not you had any conversation with Walter Holloway in regard to the defendant's Exhibits 1 and 22—the checks which have been introduced in evidence here. Did you have any conversation with him relating to them?" These questions were ad-

dressed, respectively, to Irene and Catherine Watkins, daughters of defendant. The checks had been introduced to show that the defendant had paid wages to Irene and to her brother Spencer for work done on the ranch. The defendant claimed that they were forgeries. Holloway was employed by him at the time they purported have been given, and, it appeared, knew about them. In his testimony, which had been introduced by written deposition, he had not referred to them in any way. A reading of the record will demonstrate that the questions manifestly called for hearsay testimony; and the argument of plaintiff that she had no notice, through the pleadings or otherwise, that she would be called upon to meet defendant's proof touching the checks, does not constitute a sufficient reason for ignoring the well-settled rules regarding hearsay testimony, or bring the same within any exception to those rules. We know of no rule of law or ethics, which requires a litigant to voluntarily furnish information or evidence to his adversary before trial, except such information as must be contained in the pleadings.

Many other assignments of error are contained in appellant's brief, which we consider are without merit, some of which are based on instructions to the jury. As the findings of the jury are simply advisory to the court, we pass those assignments without further notice.

For the reasons above set forth, the judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MR. JUSTICE HOLLOWAY, deeming himself disqualified, did not hear the argument, and takes no part in the foregoing decision.

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SMITH ET AL., RESPONDENTS, v. DUFF ET AL., DEFENDANTS.
KITTO ET AL., APPELLANTS.

(No. 2,607.)

(Submitted April 12, 1909. Decided July 8, 1909.)

[102 Pac. 981.]

*Waters and Water Rights—Adverse User—What Constitutes—
Evidence—Insufficiency.*

Appeal—Dismissal—Technical Grounds.

1. The law favors the right of appeal; hence, where a substantial compliance with the statutes and rules of the supreme court regulating appeals is shown, dismissal, asked on purely technical grounds, will not be ordered.

Water Rights—Adverse User—Burden of Proof.

2. The burden of proving an adverse user of water rests upon him who alleges it.

Same—Adverse User—What Constitutes.

3. In order that the use of water may be said to have ripened into a right by adverse user, such use must have been open, notorious, continuous, adverse and exclusive, under a claim of right, for the statutory period of ten years.

Same.

4. Proof of the mere use of water for the statutory period is not sufficient to show that it was adverse. To constitute an "adverse" user, the prior appropriator must have been deprived of the water when he had actual need of it, and the use must have been such that during the entire statutory period he could have maintained an action against the party claiming the prescriptive right.

Same—Adverse User—Evidence—Insufficiency.

5. Proof that claimants of water by adverse use took all that flowed in a creek at low-water season and thus deprived others thereof, did not meet the requirements of the rule declared in paragraph 4, *supra*, where it appeared that water sufficient to mature the crops of the parties against whom the prescriptive right was claimed, had always been available, and that they ceased irrigating their hay lands at about the time the adverse claimants asserted they deprived them of the water, and where the evidence failed to show that the prior appropriators did not have other crops which needed irrigation after that time.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by Joseph E. Smith and another against A. T. Duff and others; from a judgment determining water rights, defendants James Kitto and David F. Williams appeal. Affirmed.

Mr. C. B. Nolan, for Appellants.

The question as to whether or not Kitto and Williams had acquired title by adverse user to the water claimed by them was an issue of fact by the pleadings and under the proof, and the court should have made a finding thereon. (*Estill v. Irvine*, 10 Mont. 512, 26 Pac. 1005; *Quinlan v. Calvert*, 31 Mont. 115, 77 Pac. 428.) The failure to make findings on material issues is reversible error. (*Christy v. Spring Valley W. W.*, 84 Cal. 541, 24 Pac. 307; *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784; *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780; *Duane v. Neumann* (Cal.), 2 Pac. 274; *Hawes v. Green* (Cal.), 3 Pac. 496; *Ross v. Evans*, 65 Cal. 439, 4 Pac. 443; *Casey v. Jordan* (Cal.), 9 Pac. 99; *Conklin v. Stone* (Cal.), 6 Pac. 378; *Everett v. Jones*, 32 Utah, 489, 91 Pac. 360; *Levinston v. Ryan*, 75 Cal. 293, 17 Pac. 239; *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374.) It was the duty of the court to supply omissions in the findings when its attention was called to such omissions. (*Luse v. Isthmus T. R. Co.*, 6 Or. 125, 25 Am. Rep. 506; *Simmons v. Richardson*, 5 Hun, 177; *Logan v. Hale*, 42 Cal. 646; *Ogburn v. Connor*, 46 Cal. 353, 13 Am. Rep. 213; *Hayes v. Wetherbee*, 60 Cal. 399; *Mitchell v. Jensen*, 29 Utah, 346, 81 Pac. 165.) Where evidence is introduced on a material issue, the court should make the finding thereon, and until such finding is made judgment may not be properly rendered. (*Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664.)

In view of the undisputed testimony that appellants' predecessors took all the water in the stream during its low state, and at a time when the water was needed by respondents, there is no element of adverse user that is not met by the proof. (See *Hubbs v. Pioneer Water Co.*, 148 Cal. 407, 83 Pac. 253; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. 449; *Talbott v. Butte City Water Co.*, 29 Mont. 17-27, 73 Pac. 1111; *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059.) And in view of the testimony of the taking of the waters by appellants and their predecessors, the burden is on the respondents to show, if they so claim, that notwithstanding the taking, there was still sufficient for

their use. (*Gardner v. Wright*, 49 Or. 609, 91 Pac. 286; *Gurnsey v. Antelope Creek Co.*, 6 Cal. App. 387, 92 Pac. 326.)

Mr. T. J. Walsh, Mr. W. T. Pigott, Messrs. Walsh & Newman, and Mr. Geo. F. Cowan, for Respondents.

The right to take water from a stream is an easement (*Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 403, 60 Pac. 398, 50 L. R. A. 741); and a prescriptive right to an easement is acquired by adverse user of the thing, not by adverse possession of it. (*Roe v. Howard Co.*, 75 Neb. 448, 106 N. W. 587, 5 L. R. A., n. s., 831; *Ballard v. Demmon*, 156 Mass. 449. 31 N. E. 635.) Constructive possession will not justify a claim of prescriptive right to those things which can be possessed. It must be actual. And a plea of prescription must aver that possession was "actual." (13 Ency. of Pl. & Pr. 236; *Omaha etc. Trust Co. v. Parker*, 33 Neb. 775, 29 Am. St. Rep. 506, 51 N. W. 139; 1 Am. & Eng. Ency. of Law, 822.) "Adverse possession to ripen into a prescriptive title must be actual, open, notorious, exclusive and continuous for the statutory period." (*Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409; see, also, *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71, 6 S. W. 843; *Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662.) One claiming a prescriptive right to the use of water must make it good by "clear and unequivocal proof." (*Union Mill & Min. Co. v. Ferris*, 24 Fed. Cas. 599, Fed. Cas. No. 14,371, 2 Saw. 176; *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776.)

To establish the right to the use of water by adverse user, if properly pleaded, the burden is upon the party asserting that right to establish by a preponderance of evidence (1) that the water was used for a full period of ten years; (2) that during that period it was applied to a beneficial use; (3) that such use was hostile, open, notorious and continuous; (4) that it was so used under a claim of right with the intention of establishing title thereto; (5) that such use was adverse to the other parties in this: that they were deprived of the

use of water at a time when they required it for the purpose of irrigation or other beneficial use; and (6) that they had notice of such adverse user and claim. The evidence shows that the appellants failed to establish any of these elements. The evidence to sustain such right must be clear and positive. It cannot be sustained or made out by inference or presumption. (*Kurz v. Miller*, 89 Wis. 426, 62 N. W. 182; *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588; *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 554.) Nothing must be left to conjecture or presumption. (*Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527.) Such possession must be to the exclusion of all others. (*Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195.) An entry or use must be open and notorious to give the owner notice of hostile claim. (*Millett v. Lagomarsino* (Cal.), 38 Pac. 308.)

HONORABLE LLEWELLYN L. CALLAWAY Judge of the Fifth Judicial District, sitting in place of MR. JUSTICE SMITH, delivered the opinion of the court.

An extended statement of the case will not be useful. Suffice it to say that, while the district court of Broadwater county was trying the cause which seems to have involved all the waters of Crow creek, the appellants seasonably requested the court to find them to be the owners of the right to use the waters claimed by them by adverse user, rather than by appropriation. The court refused to make any finding on the subject of adverse user. It gave appellants a water right based upon appropriation solely, which made them subsequent to many other appropriators on the stream. A decree having been entered, appellants moved for a new trial, which was denied. They then appealed to this court from the order denying the motion, and from the judgment.

The respondents moved to dismiss the appeals, assigning several grounds of a technical kind. These we brush aside, because the grounds are purely technical, and because the law favors the right of appeal. A substantial compliance with the

statutes and the rules of this court is all that is required. (*Payne v. Davis*, 2 Mont. 381; *Morin v. Wells*, 30 Mont. 76, 75 Pac. 688; *Butte Mining & Milling Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696.)

Appellants rely upon this point alone: They say the court erred in failing to act upon their request for a finding that they were entitled to the water claimed by them by adverse use; that, upon the evidence, it should have made such a finding in their favor. We have concluded that the court did not so err.

The appellants having alleged themselves to be the owners of the right to use the waters claimed by them, the burden is on them to prove it. (Revised Codes, secs. 7886, 7972; Long on Irrigation, sec. 92; *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111.) Because of the nature of the right, the elements constituting it must be proven satisfactorily and unequivocally; and no doubtful inference will suffice. The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears a sort of kinship, by refined descent, to the “possession by bow and spear” of an earlier time; it is based upon a positive assertion of right in and by the water user in derogation of the rights of everyone else. In order to constitute an ownership by adverse user, say the authorities, the use must have been open, notorious, continuous, adverse and exclusive under a claim of right, for the statutory period, which in this state is now ten years. (See *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, and authorities cited.) While the authorities use both the words “open” and “notorious,” the use of either would seem to be sufficient, as they are practically synonymous when used in this connection, as inspection of the dictionaries will show. We advert to this because of the contention of counsel respecting the pleadings. Because of the conclusion to which we have come, we do not make further mention of the pleadings.

It is essential that the use be shown to have been adverse. Proof of the mere use of the water during the statutory period

is not sufficient. It is necessary that during the entire period an action could have been maintained against the party claiming the water by adverse user by the party against whom the claim is made. (*Talbott v. Butte City Water Co.*, *supra*; *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410; *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059; *Watts v. Spencer*, 51 Or. 262, 94 Pac. 39.) In the case last cited, *Watts v. Spencer*, the supreme court of Oregon said: "The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted, and will give cause of action in his favor. (Long on Irrigation, sec. 90.) No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded. (*Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; *North Powder Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642." See, also, *Bullerdick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. 334.)

In *Talbott v. Butte City Water Co.*, *supra*, this court said: "No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it invades no right of his, and cannot even initiate a claim adverse to him." And in *Norman v. Corbley*, *supra*, it is said: "There is no evidence in this record that plaintiff did not have all the water required for his use from the date of its appropriation to the time this dispute arose, and the claim of a prescriptive right cannot be maintained."

Upon the record before us it cannot be said that appellants have proved that the use of the water has been adverse. They do not claim that there is any direct proof in the record that respondents were deprived of any water to which their appropriations entitled them, at any time when the respondents required it. They say the requisite proof is furnished by tes-

timony showing that at low-water season each year they took all the waters of Crow creek, thus depriving others of it, and by a statement, which is found in the record, to the following effect: The fact was established without contradiction that there was need for the water of Crow creek taken through their ditch by appellants, and that, during the irrigation season each year, each of the parties to the action had need for the water awarded them by the decree herein.

It appears that Crow creek runs a large volume of water in flood time, reaching its maximum in the month of June. Then there is abundance for all. The creek begins to recede about July 1st, and decreases until the later part of August, when the quantity is 700 or 800 inches, perhaps less. As the stream emerges from the mountains, it is tapped by several mining ditches which convey water to an auriferous bench, which lies westerly from Radersburg. This bench is seamed by a number of gulches leading into Crow creek, three of these being named Keating, Uncle Johnny, and Charity. Placer mining has been done on this bench and in these gulches, beginning with 1867 and continuing to the present time. After the water was used for this purpose it flowed into Crow creek, whence it was taken for agricultural purposes. Appellants sought to prove that, after allowing two agricultural rights to be supplied, which they concede to be superior to their own, they took from the stream all the water at low-water season. They say that when the high water receded, and as early as July 15 each year, they diverted the water by means of their mining ditches, used it for mining, and then conducted it to Keating gulch, in which they and their predecessors in interest have maintained a dam since and before the year 1884; from Keating gulch they conducted the water to their agricultural lands, and respondents never again became possessed of it. However, appellants' witnesses also testified that parties owning a ditch called the "Swede" ditch diverted large quantities of water from Crow creek for mining purposes. This water returned to Crow creek by way of Charity gulch and Swamp creek, a tributary of Crow, and thus became available to respondents.

In addition to this, above the point in Charity gulch where the water of the "Swede" ditch was used, a dam was constructed for the purpose of catching up appellants' water to convey it to Keating gulch; mining in this gulch deposited quantities of tailings, and these were "sluiced out," thus allowing the water so used to run into Swamp creek. There was no dam in Uncle Johnny's gulch, and, when mining was carried on, the waters used there ran into Crow creek. The record is not clear as to when the mining ceases each year, but there is testimony to the effect that it sometimes continues into the first week of August.

Were it to be conceded that appellants have proved their contention that after a certain date in each year they have taken all the waters from Crow creek, still the proof falls far short of completing their case. In addition to the statement in the record above quoted, that during the irrigation season of each year each of the parties to the action had need for the water awarded them by the decree, there is found in the record finding No. 40: "That each and all of the parties who made appropriations of water within these findings set forth, except those designated as for mining purposes, have used the same each year since the date of their respective appropriations, for the irrigation of their lands, and the respective amounts of water are necessary for the proper irrigation and cultivation of said lands." This finding stands unattacked and uncomplained of.

There was testimony introduced by respondents tending to show that water sufficient to mature their crops had always been available. There was no testimony to show that any of the respondents' crops had ever suffered from the want of water. The evidence indicates that the respondents, or some of them at least, did not irrigate their hay lands after July 15, which is the date which appellants fix as the time when they deprive the others of the water, and whether the respondents had any other crops which required water after that date is purely a matter of conjecture, upon the record.

As appellants have failed to show in the first instance that their use of the water has been adverse, they are not in a position to avail themselves of the rule stated in *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286, and *Gurnsey v. Antelope Creek Co.*, 6 Cal. App. 337, 92 Pac. 326, upon which they rely; and as they did not, upon all the evidence in the case, prove one of the most essential elements in their alleged right, it may be said the most essential element, if any distinction is permissible, the court did not err in failing to find upon the question of adverse user submitted. The court cannot be in error in refusing to do a useless act.

The motion to dismiss the appeals is overruled, and the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MR. JUSTICE SMITH, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

SMITH ET AL., RESPONDENTS, v. DUFF ET AL., DEFENDANTS;
HOSSFELD AGRICULTURAL & STOCKRAISING CO.
ET AL., APPELLANTS.

(No. 2,608.)

(Submitted April 12, 1909. Decided July 3, 1909.)

[102 Pac. 984.]

Waters and Water Rights—Appropriation—Validity—How Determined—Development of Water—Evidence—Insufficiency.

Waters—Appropriation—Validity—How Determined.

1. In determining the validity of an appropriation of water, the claimant's intent, judged by his acts, the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof, are important factors.

Same—Rights of Appropriators.

2. A subsequent appropriator in a stream is entitled to have the water flow in the same manner as when he located, and he may insist that one prior to him shall be confined to what he actually appropriated or what is necessary for the purposes for which he intended to use the water.

Same—Appropriation—Evidence—Insufficiency—Remand.

3. Where the evidence in a water right suit failed to disclose what maximum amount of land respondent's predecessor in interest had irrigated, how much water he used or when he used it for irrigating purposes, what his intentions were when making his appropriation, or the character of his land, the capacity of his ditch, or how soon he carried out his intentions and to what extent, or what diligence he exercised in carrying them out, the supreme court will not enter a final judgment, but remand the cause for further proceedings.

Same—Subsurface Supply—Part of Stream.

4. The subsurface supply of a stream, whether coming from tributary swamps or running in the sand and gravel constituting its bed, is as much a part of the stream as is the surface flow, and is governed by the same rules.

Same—Development of Water—Burden of Proof.

5. One who based his right to the exclusive use of water upon an alleged development of a supply had the burden of proving that in developing it he did not intercept water to which others were rightfully entitled.

Same—Development of Water—Rule not Applicable, When.

6. The rule that one who develops a new supply of water is entitled to its exclusive use has no application to the mere removal of obstructions in, or the hastening of the flow of, a stream; nor does it apply to the draining of a swamp which has a natural outlet and feeds a stream, in the undiminished flow of which others have prior rights.

Same—Development of Water—Evidence—Insufficiency.

7. Evidence held insufficient to warrant a finding of the court that respondents in a water right suit were entitled to the exclusive use of certain water because developed by them.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

SUIT by Joseph E. Smith and another against A. T. Duff and others, and from the decree determining water rights defendants, Hossfeld Agricultural & Stockraising Co., and others appeal. Reversed and remanded.

Mr. C. B. Nolan, for Appellants.

To constitute a valid appropriation of water, three elements must always exist: First, the intent to apply to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal

or other structure; and third, an application of it within a reasonable time, to some beneficial industry. (*Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 802 (extended note); *Low v. Rizor*, 25 Or. 551, 37 Pac. 82; *Power v. Switzer*, 21 Mont. 530, 55 Pac. 32; *Toohey v. Campbell*, 24 Mont. 17, 60 Pac. 396; see, also, *Miles v. Butte Electric Co.*, 32 Mont. 67, 79 Pac. 549; 18 Am. & Eng. Ency. of Law, 2d ed., p. 498; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.) Another proposition, which seems to be axiomatic, is, that the prior appropriator cannot increase his demands so as to deprive a subsequent appropriator of his rights acquired before such increased demands and use. (*Becker v. Marble Creek Irr. Co.*, 15 Utah, 225, 49 Pac. 892; *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765, 41 L. R. A. 311; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Hargrave v. Cook*, 108 Cal. 80, 41 Pac. 18, 30 L. R. A. 390; *Strickler v. City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 248, 26 Pac. 313; *Last Chance Min. Co. v. Bunker Hill Min. Co.*, 49 Fed. 433.) The law is likewise too well settled to need citation of authorities, that the use cannot be enlarged to the detriment of a junior appropriator. (*Powers v. Switzer*, *supra*; *Union Min. Co. v. Dangberg*, 81 Fed. 73.)

Under the pleadings there was no authority for a finding in favor of developed water. A party is bound to recover, if at all, upon the causes of action alleged, and not upon some separate and distinct cause of action which may be disclosed by the evidence. (*Booth v. Farmers' Nat. Bank*, 47 Or. 299, 83 Pac. 785.) And a finding of fact outside the issues made by the pleadings is a mere nullity and will not sustain the judgment. (*Male v. Shaut*, 41 Or. 425, 69 Pac. 137; *Gamache v. South School Dist.*, 133 Cal. 145, 65 Pac. 301; 8 Ency. of Pl. & Pr., p. 944; *Harris v. Lloyd*, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736.)

Mr. George F. Cowan, for Respondents.

The right to change the use, as well as the place of use, of appropriated running water, where the established rights of

others are not interfered with, is well established. (Revised Codes, sec. 4842; Pomeroy on Riparian Rights, sec. 65; *Fabian v. Collins*, 2 Mont. 515; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554.)

That developed water is the absolute and exclusive property of the person who develops it, and that it is not subject to appropriation by any other person, is well settled. The right to appropriate water extends only to water flowing in rivers, streams, canyons and ravines. (Revised Codes, sec. 4840; *Beaverhead Canal Co. v. Dillon E. L. & P.*, 34 Mont. 135, 85 Pac. 880; *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102; *Wheatly v. Baugh*, 25 Pa. 528, 64 Am. Dec. 727; *Herri-man Irr. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719; *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280; *Yarwood v. West Los Angeles Water Co.*, 132 Cal. 204, 64 Pac. 275, 19 L. R. A. 92; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; *Cardelli v. Comstock Tun. Co.*, 26 Nev. 284, 66 Pac. 950; *Meyer v. Tacoma Light & Water Co.*, 8 Wash. 144, 35 Pac. 601; *Mosier v. Caldwell*, 7 Nev. 363; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Elster v. City of Springfield*, 49 Ohio St. 82, 30 N. E. 278; *Metcalf v. Nelson*, 8 S. D. 87, 59 Am. St. Rep. 746, 65 N. W. 911; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299.)

HONORABLE LLEWELLYN L. CAILLAWAY, Judge of the Fifth Judicial District, sitting in place of MR. JUSTICE SMITH, delivered the opinion of the court.

This controversy, like the last preceding one decided by the court, grows out of the Crow creek water suit. While there were many parties to that suit, the only ones who appear to be affected by this appeal are the Hossfeld Agricultural & Stock-raising Company, the Smith heirs, and Ed. Hossfeld, appellants, and Blondell, Massa, and Rothfus, respondents. We shall refer to these respective parties hereafter as the appellants and respondents. The district court awarded appellants the right to use

512 inches of water diverted from Crow creek as of date May 1, 1885, through a ditch owned by them jointly. The respondents were awarded the right to use 400 inches of the waters of the Willow Swamp as of date May 1, 1872, and the exclusive right to use 160 inches of the waters of the swamp "by reason of water developed" by them. Respondents' waters are diverted through their "Willow Swamp canal." Appellants' ditch taps Crow creek below the mouths of all its tributaries and below the heads of the ditches of all others to the suit. The record indicates that the Willow Swamp discharges its visible waters through Marsh creek naturally; possibly some through Swamp creek. Both are important tributaries of Crow creek. Any diversion which takes the water of either of these streams lessens the quantity flowing in Crow creek; and any diversion which takes away from the swamp water which would flow naturally in either Marsh creek or Swamp creek accomplishes the same result. At the trial counsel for appellants requested the court to find respondents' rights to be later in point of time than those to be awarded the appellants, and that there was no development of water on account of work done in the Willow Swamp by the owners of the Willow Swamp canal. The court refused to so find, but found as above stated. The appellants then moved for a new trial, which was denied, whereupon they appealed to this court from the order denying their motion and from the judgment. The respondents have moved to dismiss the appeals upon grounds similar to those lodged against the appeals of Kitto and Williams, and their motion is overruled for like reasons. (*Smith v. Duff ante*, p. 374, 102 Pac. 981.)

1. Taking up first the right given respondents as of date May 1, 1872. It seems that four persons commenced to dig the Willow Swamp canal in the spring of 1872. They intended to convey water to a point near the Missouri river for the purpose of placer mining. The canal was completed in 1874, or 1875 probably. It was used for mining only one year, as the gold was so fine it could not be mined profitably. When the canal was constructed it absorbed a ditch belonging to the witness Ross, which had been dug in 1871. According to his statement the

diggers of the canal used the water it diverted in subordination to the right he claimed. He had been irrigating about fifteen acres by means of his ditch. It seems from his testimony—and he is the only witness who gave any direct testimony on the subject—that these men intended to use water only in the spring and fall when it was not needed by others for irrigation. They did not claim, nor did they intend to use, any water for irrigation; nor did either of them ever use any for that purpose, with the exception of MacFarlane, who possessed a small ranch and cultivated a garden. He may have irrigated ten or twelve acres. Ross diverted what water he needed from the canal at pleasure. He seems to have been recognized as an owner in it. After its completion the greatest amount of land he farmed in any year was eighty acres, but in what year this was done it is not possible to say from the record. He further testified that after the completion of the canal the only water from it which was used for irrigation was what was used by himself and MacFarlane. How comprehensive this last statement was intended to be we do not know. The witness Macomber's recollection is that the water was used first on the lands owned by respondents as early as 1880, but he would not testify positively to that. He did not give any information as to the amount of land irrigated, nor as to the quantity of water used. It is fairly deducible from the record that no greater quantity of water than that testified to by Ross as having been used by himself and MacFarlane was used by respondents or their predecessors in interest prior to 1895, which was long after the appropriation of appellants.

It is apparent from this testimony that the only rights which should be awarded respondents superior to appellants are those based upon the appropriations of Ross and MacFarlane. Not by any construction may respondents succeed to the so-called appropriation for mining, and use it for agriculture under the conditions above set forth.

The intention of the claimant is an important factor in determining the validity of an appropriation of water. "When that is ascertained, limitation of the quantity of water necessary

to effectuate his intent can be applied according to the acts, diligence, and needs of the appropriator." (*Power v. Switzer*, 21 Mont. 523, 55 Pac. 32.) "As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof." (*Toohy v. Campbell*, 24 Mont. 13, 60 Pac. 396; *Miles v. Butte Electric & Power Co.*, 32 Mont. 56, 79 Pac. 549.)

It seems that prior to 1893, when the respondent Massa bought the MacFarlane holdings, not to exceed twelve acres had been irrigated by his predecessors in interest. Taking the most favorable view of that right, then, it should be allowed water sufficient to irrigate that amount of land; but we are unable to say from the evidence the quantity which should be fixed as determining the right, without resorting to conjecture. We are not informed as to the character of the land through which the ditch runs after leaving Marsh creek, nor its length from that point to the place of use. We do not desire to guess as to the quantity of water lost by seepage and evaporation as it passes through the ditch, nor as to the quantity required to irrigate those twelve acres of land.

As above noted, the record does not show when Ross irrigated his maximum amount of land; whether it was before or after appellants' appropriation. What were his intentions when he made his appropriation? How large was his ditch? How much land did he possess, and how much did he contemplate using the water upon? How soon did he carry out his contemplated use, and to what extent? What diligence did he employ? These questions, too, we are compelled to leave unanswered.

It is said in *McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648: "The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other

portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it." In using the language above quoted, we think the court did not mean to imply, as a rule of universal application, that an appropriator is entitled to all the water which will flow in his ditch at the time a subsequent appropriation is made by another. The prior appropriator will not be permitted to claim more than his ditch will carry; he may be, and usually is, limited to less. The time when the first appropriator dug his ditch, his diligence in applying the water to a beneficial use, the extent of the use made by him, his needs, and the circumstances surrounding all these acts, are to be considered in determining the amount which he is entitled to in preference to the subsequent appropriator. As illustrative of this: If MacFarlane had been the sole owner of the canal, which had a carrying capacity of 400 inches when appellants made their appropriation, and yet for twenty years prior to appellants' appropriation he had never irrigated in excess of twelve acres of land, his prior right would be confined to enough water to irrigate that land. The court would say that was all he ever intended to use, deducing his intentions from his acts during that long period of time. One is not permitted to obtain the exclusive control of an entire stream by appropriation "unless his appropriation is made for some beneficial purpose, presently existing or contemplated." (*Toohy v. Campbell, supra.*) A subsequent appropriator is entitled to have the water flow in the same manner as when he located, and "he may insist that prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water." (*Spokane Ranch &*

Water Co. v. Beatty et al., 37 Mont. 342, 96 Pac. 727, 97 Pac. 838. and authorities cited.)

A final conclusion of this case by this court would be based, not only upon conjecture to a considerable extent, but also upon the assumption that there is no evidence obtainable upon which to adjudge rightly the Ross and MacFarlane rights. The paucity of facts to sustain their rights is attributable to respondents, and probably they could not be heard to complain if we should pass a final judgment upon the record as it stands. However, we think the interests of justice will be subserved best by giving them and their adversaries, the appellants, an opportunity to dissipate the mist which permeates this record now, and have concluded to remand the case for further proceedings.

2. As to the developed water: The court found the respondents to be entitled to the use of 160 inches of the waters of the Willow Swamp "as against every other party to this suit by reason of water developed by said defendants by the draining of said Willow Swamp by the Willow Swamp canal."

From the map in evidence it seems that Willow Swamp covers an area of approximately a square mile. Further than this the record furnishes us with little information as to its character. It is referred to simply as a swamp. The so-called original channel of Swamp creek passes through a portion of it. Marsh creek is "the child of the swamp." Whatever water it has produced in the course of nature undoubtedly is tributary to Crow creek. Whether the water which saturates the swamp comes from subterranean springs, or through percolation from higher adjacent lands, or whether it is in part supplied by a subsurface flow in the bed of the original channel of Swamp creek or in the lands adjacent thereto, we are not advised. Neither are we informed as to its surface flow during different periods of the year, except in the instances hereinafter referred to. It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules. (*Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, 31

Colo. 62, 72 Pac. 49; *Howcroft v. Union & Jordan I. Co.*, 25 Utah, 311, 71 Pac. 487.) These inquiries are pertinent, for if the respondents have not added to the waters natural to Crow creek, they may not take any of them to the deprivation of prior appropriators. If by their own exertions they have developed a supply of water theretofore not a part of the waters of Crow creek and not before available to the users of the stream, they have the first right to take and use such increase. (*Beaverhead Canal Co. v. Dillon Electric L. & P. Co.*, 34 Mont. 135, 85 Pac. 880.) "It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel to the benefit of other prior appropriators which the law recognizes as an increase of that character which can be diverted as against those entitled to its natural flow." (*Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, *supra*.)

Whoso asserts that he is entitled to the exclusive use of water by reason of its development by him must assure the court by satisfactory proof that he is not intercepting the supply to which his neighbor is rightly entitled. Thus the burden was on the respondents to prove that they developed the 160 inches of water awarded them by the court in addition to the natural supply of Crow creek (*Howcroft v. Union & Jordan I. Co.*, *supra*; *La Jara Creamery & L. S. A. v. Hansen*, 35 Colo. 105, 83 Pac. 644); this proof necessarily would have given assurance that in taking the alleged new supply they did not diminish the quantity of the principal stream. We recognize the difficulty of making proof in cases like this, and have searched the record carefully to see if respondents produced evidence to substantiate the court's findings, but we have searched in vain.

The Willow Swamp canal commences near the head of the swamp, runs through it, occupies the bed of Marsh creek for a short distance, and then proceeds to the ranches of respondents. In October, 1895, the respondents began to run lateral ditches from the canal toward the head of the swamp, and the work was completed September 30, 1896. How much work was done

the record does not show. One of them, Massa, says it increased the flow in the canal about half. Whether this was a permanent increase is left to conjecture. The proof is not of such a character as to permit the indulgence of the presumption "that a thing once proved to exist continues as long as is usual with things of that nature." (Revised Codes, sec. 7962, subd. 32.) The witness Macomber made measurements of the water running in the canal both before and after the work. In September, 1895, he found 324 inches, and on October 30, 1896, 513 inches flowing therein. He says there was "quite a good rain" before the measurement of 1895 and "a couple of pretty good rains" before that of 1896, and that rain affects the swamp; "the water raises to the top of the ground as quick as there is rain." He said he could not tell whether the difference in the two measurements was due to work done or to rain, and that he did not know the supplying agencies of the swamp, but that irrigation on the land above has a tendency to increase its waters. Where the lateral ditch ran into his field it was "one spade deep" and probably two feet wide. No other dimensions of laterals are given. The witness Ross testified that lateral ditches were run in the swamp "to increase the water" as early as 1879 or 1880, but whether this work effected any permanent increase is also conjectural.

In August, 1906, 168 inches of water flowed in the canal above, and 182 inches below, its junction with Marsh creek. The last point mentioned seems to be the point where Macomber made his measurements. This indicates that the water produced by the swamp has decreased very materially since 1896, or that it produces more water in the fall than it does in the summer. If the latter supposition be true, it is consistent with the testimony of Macomber, who is of the opinion that the swamp is largely supplied by water from the irrigation of lands above. It is a matter of common knowledge that the flow from irrigated lands is heaviest in the fall.

It is questionable whether the running of the laterals did more than to facilitate the outlet of the surface waters with which the swamp was saturated. Removing obstructions and making easy,

the flow of water would increase the output for a time undoubtedly, but this does not even imply that such work has tended to develop water. "The rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there." (*Beaverhead Canal Co. v. Dillon Electric L. & P. Co.*, *supra*. It is readily appreciated that where waters are impounded, as for instance in a swamp, with no natural means of escape, and one, by work done, releases them and provides a permanent supply of water for use which had theretofore not been available, he may be said to have developed the water. This is quite a different matter from draining a swamp. Draining a swamp exhausts it and causes it to dry up, and this the use of the word "drain" necessarily implies.

The record is absolutely barren of testimony indicating that the respondents through their exertions have added a single drop to the waters of Crow creek. It is possible, upon a further hearing of this phase of the case, that respondents will be able to establish as a fact that they have developed water in the Willow Swamp. Before proceeding further, however, they should ask permission of the lower court to amend their answers to warrant the reception of evidence upon that feature of the case.

The judgment is reversed and the cause is remanded. The district court of Broadwater county is directed to make findings respecting the rights of appellants and respondents in accordance with the views expressed in this opinion, upon the evidence already in the record, and such other evidence as the parties may be able to furnish the court upon the points at issue.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MR. JUSTICE SMITH, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

HOSKINS, APPELLANT, v. NORTHERN PACIFIC RAILWAY CO. ET AL., RESPONDENTS.

(No. 2,674.)

(Submitted June 17, 1909. Decided July 8, 1909.)

[102 Pac. 988.]

*Personal Injuries—Railroads—Postal Clerks—"Passengers"—
Burden of Proof—Excessive Speed—Complaint—Cause of
Accident—Surplusage, When—Costs—Memorandum—Suffi-
ciency—District Court Rules—Construction.*

Personal Injuries—Railroads—Postal Clerks—"Passengers."

1. Postal clerks, when carried by a railway company under an arrangement with the United States government with reference to the transportation and handling of mail, are "passengers."

Same—Postal Clerks—Passengers—Burden of Proof.

2. Where, in an action against a railroad company by a railway postal clerk for injuries sustained while off duty, caused by the derailment of a train, plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was on him to prove that he was a passenger, and it was incumbent on him to show, either that defendant was under a specific contractual or statutory obligation to the government to carry him in the mail-car where he was at the time, or that defendant recognized a request for transportation when he was off duty.

Same—Railroads—Excessive Speed—Proximate Cause.

3. The running of a railway train, when late, at a speed of forty-five miles per hour, is not *per se* excessive, and the fact that the schedule time was about twenty-four miles per hour is of no importance in determining whether the carrier's alleged negligence in this regard was a proximate cause of a derailment.

Same—Passengers—Cause of Derailment—Complaint—Surplusage.

4. Plaintiff, in an action against a railway company for injuries suffered while being transported as a passenger, need not allege or prove in his affirmative case the particular cause of a derailment; therefore, allegations of specific causes of the accident should be treated as surplusage, and he may rely upon his *prima facie* case without attempting to substantiate them.

Same—Pleadings—Sufficiency—How Determined.

5. The sufficiency of a pleading must be determined from the facts from which the legal duty or liability is deduced.

Same—Railroads—Cause of Derailment—Pleading and Proof.

6. In a personal injury action against a railway company where proof of the specific cause of derailment of a train is necessary to fix a liability upon defendant, the failure of plaintiff to make *prima facie* proof of one, at least, of the grounds of negligence alleged in the complaint is fatal, and proof of some other ground will not supply the defect.

Costs—Memorandum—Verification—Sufficiency.

7. An affidavit to a memorandum of costs made by one of defendant's attorneys, stating that the memorandum was true and correct, and the

39	394
41	290
41	325
41	331
41	395
41	429
41	478
41	491

39	394
40	585

items were reasonable, and necessarily incurred in defense of the cause, to the best of his knowledge and belief, substantially complied with section 7170, Revised Codes.

District Courts—Rules—Construction—Review.

8. It is within the province of the district court to construe its own rules, and the supreme court will not interfere therewith, unless the construction is clearly unreasonable and erroneous.

Same—Rules—Costs—Number of Witnesses.

9. Under a rule of the district court that in all civil actions not more than five witnesses should be examined as to "any question of fact or issue in the cause," the phrase quoted *held* to refer to any single, substantial allegation of the pleadings on which an issue is raised, and not to the ultimate fact to be determined; therefore where several grounds of negligence were alleged by plaintiff in a personal injury action against a railway company, he could not complain that defendant, on nonsuit, was allowed costs of witnesses brought into court to disprove such allegations.

Costs—Verified Memorandum—Prima Facie Evidence of Correctness.

10. A verified memorandum of costs is *prima facie* evidence of the correctness of the items of disbursements enumerated therein.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Henry E. Hoskins against the Northern Pacific Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

Plaintiff having been in the employ of the government, and having transportation over the road, was a passenger entitled to all the protection which the railroad company was obliged to provide for its passengers. (6 Cyc. 542; *Union R. & T. Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896; *Little Rock & Ft. Scott Ry. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Waterbury v. New York Cent. Ry. Co.*, 17 Fed. 672, 21 Blatchf. 314; *Chicago, Milwaukee & St. Paul Ry. Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551; *Indiana & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Everett v. Oregon etc. Ry. Co.*, 9 Utah, 340, 34 Pac. 289; *Yeoman v. Contra Costa S. N. Co.*, 44 Cal. 73; *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346; 36 Am. St. Rep. 550, 33 N. E. 116, 19 L. R. A. 339.) Under our statute, the defendant was bound to the exercise of the highest degree of care for the safe transportation of the plaintiff. The plaintiff's evidence

showed that the train was running at a high rate of speed, and that the train was derailed resulting in injury to him,—he being a passenger. This created a *prima facie* case for him, because railroad trains operated with the usual care do not, as a matter of fact, become derailed. (*Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744; Patterson's Railroad Accident Law, p. 438; 5 Am. & Eng. Ency. of Law, 2d ed., p. 627, and notes; *Dempster v. Oregon Short Line R. R. Co.*, 37 Mont. 335, 96 Pac. 717; *Hamilton v. Great Falls Ry. Co.*, 17 Mont. 344, 42 Pac. 860, 43 Pac. 713.)

That the mere running of a train at the excess of speed is no evidence of negligence in this case against the defendant is contrary to the evidence in the case and to the principles of law applicable thereto. It is a rule that the peculiar facts need not be stated. If they need not, and the complaint states the negligence of the defendant, we cannot conceive upon what theory the court could hold that a statement of ground not necessary compels proof of the surplusage, or that otherwise there is a failure of action. (*Cunningham v. Los Angeles R. R. Co.*, 115 Cal. 561, 47 Pac. 452; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899.) Under the facts in this case negligence is to be presumed. (*Libby v. Banks*, 110 Ill. App. 330; affirmed, 209 Ill. 109, 70 N. E. 599; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164; *Jensen v. Joseph B. Thomas*, 81 Fed. 578-589.) The plaintiff having made a *prima facie* case, the court erred in sustaining the motion for nonsuit. (*Stephens v. Elliot*, 36 Mont. 99, 92 Pac. 45.)

The motion to tax costs should have been absolutely sustained, and the costs should have been taxed against the defendants and not against the plaintiff in any part. The statute requires that the costs should be itemized. The costs here claimed are not itemized. (*Hotchkiss v. Smith*, 108 Cal. 285, 41 Pac. 304; *Crawford v. Abraham*, 2 Or. 163; *Wilson v. City of Salem*, 3 Or. 482; *Waite v. Vinson*, 18 Mont. 410, 45 Pac. 552; *Cole v. Ducheneau*, 13 Utah, 42, 44 Pac. 92; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Garr v. Cranney*, 25 Utah, 193, 70 Pac. 853.)

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines, for Respondents.

The case of *Pierce v. Great F. & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867, disposes of the contention that the proof of the wreck alone, under his pleading, puts the burden of proof upon the defendant. (See, also, *Palmer v. Winona Ry.*, 78 Minn. 138, 80 N. W. 869; *Lincoln Co. v. Webb*, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258; *Gibson v. International Trust Co.*, 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928.)

Mere proof of high speed is not alone sufficient to charge a railroad company with negligence. It may be evidence of negligence, when considered with all other circumstances, but it is not of itself negligence. (2 Hutchinson on Carriers, sec. 926.) No rate of speed is negligence *per se*. (3 Elliott on Railroads, 2d ed., p. 337, sec. 1160, note 108.) Before speed can be considered as negligence, it must have something in connection with it which makes it dangerous or unsafe. (*Golin-raux v. Burlington etc. R. Co.*, 125 Iowa, 652, 101 N. W. 465.) Outside of cities or towns, where, because of laws in the nature of ordinances forbidding it, presumptions of negligence might arise from a violation of those ordinances, no rate of speed, however great, is alone sufficient evidence to establish negligence. (*Omaha Ry. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447; *Chesapeake Ry. v. Clowes*, 93 Va. 189, 24 S. E. 833; *Tobias v. Michigan etc. Ry.*, 103 Mich. 330, 61 N. W. 514-518; *Southern Indiana Ry. Co. v. Messick*, 35 Ind. App. 676, 74 N. E. 1097; *New York Ry. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130; *Dyson v. New York*, 57 Conn. 9, 14 Am. St. Rep. 82, 17 Atl. 137.)

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this case alleges that plaintiff was a passenger on a passenger train of the defendant running between Garrison and Butte, Montana; "that the said defendant, through its negligence and lack of care, allowed its railroad tracks to become out of repair, and in an unsafe condition to operate its said trains over; that on the day plaintiff was injured its said

tracks in the neighborhood of the public road crossing, about one and one-half miles west of the Colusa smelter, were in a dangerous and unsafe condition, so that in running a train over the same there was danger of the said train breaking the rails and being ditched; that said rails were in an imperfect and unsuitable condition to be used as railroad rails at said place, as the plaintiff is informed and believes, and therefore alleges, and that the same were defective, in that the material out of which they were made was insufficient, and said rails were not properly placed upon the road so as to permit of the use of the same by the defendant company in operating its trains, and that, while the defendant was a common carrier as to the plaintiff, and plaintiff was rightfully riding in one of the cars of the defendant, at about 11:30 o'clock P. M. on May 1, 1908, the said defendant had in its employ one Frederick W. Lenzi, as its engineer, who was running said train; that the schedule time of said train, according to the rules of said defendant company, as plaintiff is informed and believes, and therefore alleges, was at the rate of twenty-four miles per hour; that at said time said train was behind its time, and the said engineer negligently and carelessly ran the same at the rate of forty miles an hour, and that on account of said rate of speed of said train, the same having two engines thereto attached, and on account of the condition of the rails of said railroad track and of said track, as hereinbefore alleged, the said train, or a part thereof, left said track at said point, and the engines and the car on which this plaintiff was riding went into the ditch, one of the rails of said track being broken, and causing said derailment and wreck; that the said defendant Lenzi is a resident and citizen of Butte, Montana, and had he exercised the care required of him, he would have seen the bad condition of said railroad, and would not have run said engine at said speed, and would have stopped said train or slowed up its speed, and thereby avoided said injury." Then follows an allegation that plaintiff suffered injuries. Defendants for answer denied that plaintiff was a passenger on the train, "or was thereon in any other manner than as a licensee"; admitted that the train

was wrecked, but denied that the wreck was caused by any acts or omissions on their part. They then allege affirmatively that the wreck was caused by an explosion of dynamite, or some other highly explosive and dangerous material, placed upon the track without their knowledge or consent, by some person with criminal intent to wreck the train. Plaintiff denied the affirmative allegations of the answer.

At the trial the plaintiff testified: "I was on train No. 6 of the Northern Pacific Railway Company returning from extra duty to Garrison, and I had transportation on the train—it was government transportation—and I had the transportation with me. In going down to Garrison I was on extra duty working up what we call 'stuck mail,' or undistributed mail. My position was known as railway postal mail clerk." Plaintiff's counsel then read to the jury, seemingly without identification, and without objection, the following:

"1908.

"Postoffice Department, Office of the Postmaster-General, Washington, D. C., January 1, 1908.

"To whom it may concern:

"The bearer hereof, Henry E. Hoskins, has been appointed a railway postal mail clerk of the Northern Pacific Railway Company, which company is required to extend the facilities of their travel between the points named on opposite pages when on duty, and when traveling to and from duty. If fare is charged receipt should be given. Valid only when countersigned by general superintendent of the division railway mail service.

"GEORGE v. L. MEYER.

"Countersigned: ALEX GRANT, General Superintendent, R. M. S."

Indorsed on back, "Good only between Miles City and Spokane over Northern Pacific R. R."

The witness continued: "On the next page is a photograph of me. This trip that I made began at Logan. I went to Logan from here [Butte] and worked west from Logan to Garrison, and when I returned from Garrison and got into the

neighborhood of the Tivoli brewery, the train left the track, and I was injured. I figured the speed of the train to exceed somewhere in the neighborhood of forty-two or forty-five miles an hour. There were two mail clerks in the car. Mr. Paul Burt was the regular clerk in charge of the car. The distance from Garrison to Butte is 51 miles according to the Northern Pacific table. No. 6 should leave Garrison at 9:30 P. M. according to the regular time of the Northern Pacific Railway Company, and the regular time for its arrival in Butte was 11:30. I know the customary time for running over the road between Garrison and Butte is two hours." The foregoing is all of the testimony in the case, save that of Dr. Monohan as to the extent of plaintiff's injuries.

Defendants moved for a nonsuit "on the ground that there is nothing in the derailment of a train that creates a presumption of negligence in the case of this plaintiff; that there is no proof that plaintiff was a passenger; that there has been no proof of the allegations of excessive speed or negligence in respect of defective rails, and no proof of any of the particular negligence alleged in the complaint, and no proof that the defendant company had allowed its track to become out of repair or in an unsafe condition, and also upon the ground that the mere running at a speed in excess of the schedule time is not any evidence of negligence." The motion was granted, judgment entered for the defendants, with costs, and plaintiff appeals.

The status of a postal clerk is thus defined in 6 Cyc. 542: "Postal clerks, carried under an arrangement with the United States government with reference to the transportation and handling of mail, are passengers while thus being transported." (See, also, *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550, 33 N. E. 116, 19 L. R. A. 339; *Gulf, C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345, 15 S. W. 280, 11 L. R. A. 486.) The defendants seem not to dispute the foregoing rule, but contend that, conceding that plaintiff was by occupation a postal clerk, there is no testimony to warrant the conclusion that the relation of passenger and carrier

existed between the parties at the time of the accident to the train. We think this point is well taken. As the plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was upon him to prove that he was a passenger. It was incumbent upon him to show, either that the defendant company was under a specific contractual or statutory obligation to the government of the United States to carry him, or that the company recognized the request embodied in the photograph commission, relating to his transportation when he was off duty. If he had been in charge of the mail at the time of the accident, this obligation would not rest upon him, for the reason that section 4000, Revised Statutes (U. S. Comp. Stats. 1901, p. 2719), imposes upon railway companies carrying the mail the duty to also carry, without extra compensation, the person in charge of the same. Being off duty at the time, and having in his possession simply a request for transportation, he should have supplemented his case by showing that the defendant company was under either express or implied obligation to carry him, and that, too, in the place where he was, to-wit, the mail-car.

Defendants also contend that the motion for a nonsuit was properly granted, for the reason that having alleged specific grounds of negligence in his complaint, the plaintiff could not recover unless he proved one or more of them to have been the proximate cause of the derailment. The case of *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867, is relied on to sustain this contention. It is suggested by the plaintiff that he has brought himself within the rule seemingly there laid down, by proving the excessive speed of the train. But we cannot sustain him in this contention. A speed of forty-five miles per hour is not *per se* excessive, and the fact that the schedule time was about twenty-four miles per hour is of no importance. The train was late, and it is matter of common knowledge that the schedule time is not adhered to under such circumstances. This court held in the *Pierce Case* that proof of the derailment of a car, in consequence of which a passenger therein was injured, being ordinarily *prima facie* evidence of negligence on

the part of the common carrier, no necessity exists for the passenger to allege the particular cause of the accident. We adhere to this rule of pleading, and suggest the danger, and the absence of necessity, of departing from it. We suggest, also in this connection, that it is questionable whether this complaint contains any general allegation of negligence. The *Pierce Case* was undoubtedly decided correctly on the facts, and it was unnecessary to consider any question of practice. We hold that, as no duty rests upon a plaintiff, who is a passenger, to allege or prove in his affirmative case the particular cause of the derailment, allegations of specific causes in the complaint should be treated as surplusage, and he may rely upon his *prima facie* case without attempting to substantiate them. The sufficiency of a pleading must be determined upon the facts from which the legal duty or liability is deduced. (*Marvin Safe Co. v. Ward*, 46 N. J. L. 19.) In so far as the case of *Pierce v. Great Falls & C. Ry. Co.*, *supra*, conflicts with these views, it is overruled. The rule of law therein announced does not apply to a case where there is no necessity for the plaintiff to make proof, in the first instance, of the specific cause of derailment, but only to those cases where such proof is necessary in order to fix a liability upon the defendant. In the latter instance a failure to make *prima facie* proof of one, at least, of the grounds of negligence specifically alleged in the complaint is fatal, and proof of some other ground will not supply the defect. (See *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410; *Chicago & Alton R. R. Co. v. Rayburn*, 153 Ill. 290, 38 N. E. 558; *Santa Fe etc. Ry. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216; *Gulf, C. & S. F. Ry. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948; *Gurley v. Missouri Pac. Ry. Co.*, 93 Mo. 445, 6 S. W. 218; *Chicago B. & Q. R. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Buffington v. Atlantic & Pac. R. R. Co.*, 64 Mo. 246; *Carter v. Kansas City etc. Ry. Co.*, 65 Iowa, 287, 21 N. W. 607; *Telle v. Leavenworth etc. Ry. Co.*, 50 Kan. 455, 31 Pac. 1076; *Woodward v. Oregon R. & N. Co.*, 18 Or. 289, 22 Pac. 1076; *McCain v. Louisville & N. R. R. Co.*, 13 Ky. Law Rep. 809, 18 S. W. 537.)

The supreme court of Illinois, in *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714, said: "It was sufficient to prove enough of the negligence charged to make out a case." The supreme court of Michigan, in *Thayer v. Flint etc. R. R. Co.*, 93 Mich. 150, 53 N. W. 216, said: "The allegation not proven must be regarded as immaterial." A demurrer to a complaint for insufficiency can only be sustained when the complaint fails to state any cause of action whatever. (*Donovan v. McDewitt*, 36 Mont. 61, 92 Pac. 49.) In the case of *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976, this court said: "The form in which an action is brought is of no consequence; nor does it matter that the complaint contains allegations not appropriate to the purpose sought to be attained. In determining the issue of law presented by a general demurrer to a complaint, or by any other appropriate method of raising the question—as here, by an objection to the admission of evidence at the trial, on the ground that the facts stated do not warrant any relief—matters of form will be disregarded, as well as allegations that are irrelevant or redundant; and if, in any view, the plaintiff is entitled to any relief the pleading will be sustained." Section 6714, Revised Codes, provides that a judgment of nonsuit may be entered by the court, upon motion of the defendant, when the plaintiff fails to prove a sufficient case for the jury. The motion for a nonsuit in this case was in the nature of a demurrer to the evidence, the defendants contending that, upon the facts proven, the plaintiff was not entitled to any relief, and the rule laid down in *Raymond v. Blancgrass*, *supra*, applies. As the complaint was simply the basis or foundation of plaintiff's proof, if it contained allegations sufficient to enable him to introduce testimony showing a liability on the part of the defendants, and he could, in the absence of the specific allegations, rest his case without proving the particulars in which the latter were negligent, then it seems to follow that, although he had made specific allegations of negligence, such allegations were immaterial, and should be disregarded.

At the date of entering judgment the defendants filed a "memorandum of costs" entitled in the court and cause, includ-

ing therein certain items of disbursements for clerk's fees, sheriff's fees, and witness fees and mileage. This memorandum was verified by one of defendants' attorneys as follows: "The foregoing memorandum of costs is true and correct, and the items are reasonable, and have been necessarily incurred in the defense of said cause, to the best of my knowledge and belief." Plaintiff moved to strike the memorandum from the files for the following reasons: "(1) That the same is not a memoranda of costs against this plaintiff made out and filed as required by law. (2) Because it is provided in Rule XI that: 'In all civil actions not more than five witnesses shall be examined as to any question of fact or issue in the case, nor shall the testimony of witnesses in excess of that number be introduced thereon. Upon application of [to] the court, before the trial is begun, this rule may be relaxed by the court for special reasons.' That said rule was not relaxed by the court, and that under the pleadings in this case there was but one issue upon which witnesses for the defendant could be used, to-wit, whether or not the defendant's train was blown from the track by dynamite or explosives. (3) That said memoranda contains the names of more than five witnesses, and if proper in other respects, the same, and no part of the charges therein, could be allowed by the court." The court overruled the motion. Plaintiff also filed certain objections to the memorandum, and to particular items therein, and requested that the costs be taxed. The court sustained plaintiff's objections to all claims for mileage on the part of defendants' witnesses, and taxed the costs at \$350.30. The refusal of the court to sustain his other objections is assigned as error by the plaintiff. We think the memorandum is properly entitled, and that the affidavit attached thereto is in substantial compliance with section 7170, Revised Codes. It was within the province of the district court to construe its own rules, and this court will not interfere with such construction, unless it is clearly unreasonable or erroneous. Undoubtedly the phrase "any question of fact or issue in the cause" refers to any single, substantial allegation of the pleadings upon which an issue is raised, and not to the ultimate fact to be de-

terminated. It is contended by the plaintiff that the only issue of fact in this case was whether the derailment was caused by an explosion of dynamite, but we cannot agree with him in this. In addition to proving the affirmative allegations of their answer the defendants were notified, by the plaintiff himself, to come into court prepared to disprove several alleged grounds of negligence set forth in the complaint, and plaintiff is not now in a position to complain that they did so. We think the court did not err in applying its rule, in view of the fact that the verified memorandum of costs was *prima facie* evidence of the correctness of the items of disbursements. (*King v. Allen*, 29 Mont. 5, 73 Pac. 1107; *Brande v. Babcock Hdw. Co.*, 35 Mont. 256, 119 Am. St. Rep. 858, 88 Pac. 949.)

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

CITY OF MILES CITY, RESPONDENT, v. STATE BOARD OF
HEALTH, APPELLANT.

(No. 2,705.)

(Submitted June 28, 1909. Decided July 3, 1909.)

[102 Pac. 696.]

*Cities and Towns—Public Health—Water Supply—Discharge of
Sewage into Streams—State Board of Health—Validity of
Order—Appeal to District Court—Burden of Proof.*

Cities and Towns—Discharge of Sewage—State Board of Health—Regularity of Procedure.

1. The fact that the state board of health did not hear testimony before it made an order prohibiting a city from polluting a stream which is a source of water supply for domestic uses, is not a valid objection to the order. Section 1566, Revised Codes, under which the board acted, does not provide for a public trial, but contemplates an *ex parte* investigation by the board.

Same—Pollution of Streams—Statutes.

2. The validity of the order of the state board of health above referred to was not affected by the fact that the intake of the water

supply of the next town on the river below the outfall of defendant city's sewer was many miles away. The prohibition of the statute (Chapter 177, Laws 1907 [Revised Codes, secs. 1559-1572]) is against the pollution of a stream at any place within the state.

Same—Public Health—Prescription—Police Power.

3. Prescription does not run against the right of the state to protect the public health by preventing the pollution of a stream which is a water supply for domestic uses; nor may the state waive or divest itself of its police power in this respect.

Same—Appeal from Order of Board—Burden of Proof.

4. A city against which the state board of health had issued an order prohibiting it from emptying its sewage into a river before proper purification, had the burden of showing, on appeal to the district court, that the order was not justified; hence, where it produced no evidence whatever, and the order, upon its face, bore no evidence of its own invalidity, the order will be held valid.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by the City of Miles City against the State Board of Health of Montana to annul an order issued by the board prohibiting plaintiff city from emptying sewage into Yellowstone river. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mr. Albert J. Galen, Attorney General, *Mr. E. M. Hall*, and *Mr. W. L. Murphy*, Assistant Attorneys General, for Appellant.

Both state and local boards of health have been sustained in making orders affecting property rights of corporations or individuals without a hearing, especially so where a right of appeal is given. In the leading case of the *City of Taunton v. Taylor*, 116 Mass. 254, this principle is elucidated and confirmed. Another Massachusetts case, *Salem v. Eastern Ry. Co.*, reported in 98 Mass. 431, 96 Am. Dec. 650, takes the same view. The footnote to this case contains numerous citations to other cases which are in accord with the two referred to. The sanitary condition of local communities being largely dependent upon the character of the public water supply, the most stringent statutes, as well as rules and regulations, may be enacted and enforced. (See *Gloucester-Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Parker & Worthington on Public Health and Safety*, sec. 298; *State v. Wheeler*,

44 N. J. L. 88; *City of Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A., n. s., 321.)

The legislature cannot divest itself of its police power, and all persons and corporations hold their property subject to such police power. (8 Cyc. 856, 866; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989.)

Respondent contends, also, that the legislature has no power to pass an act prohibiting the dumping of sewage into the Yellowstone river. It is within the police power of the legislature to provide for water supplies and to protect the same from pollution. (8 Cyc. 869; see exhaustive opinion of Mr. Justice Peckham in *New York City Health Department v. Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, 27 L. R. A. 710.) For additional authorities dealing with the question of the police power of the state in relation to questions of public health, see Freund on Police Power, secs. 140-155; also 2 Current Law, 173; 3 Current Law, 1599; 5 Current Law, 1641; 8 Current Law, 36.)

Mr. George W. Farr, and *Mr. C. R. Tisor*, for Respondent.

The authorities are uniform in their holding that a prescriptive right to pollute the waters of a stream may be created by an uninterrupted adverse user thereof for the statutory period. (*Masonic Temple Assn. v. Harris*, 79 Me. 250, 9 Atl. 737.) "A prescriptive right to pollute a stream is available if such right has been acquired by adverse user, though such use might have been originally a nuisance." (*Warren v. Hunter*, 1 Phila. 414; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.)

Chapter 177 not only prohibits a future use of the streams for the purposes therein mentioned, but has also a retrospective action, in that it imposes liabilities upon the city of Miles City which did not exist at the time of the passage thereof, and disturbs and affects the established and vested rights of the said city; and for these reasons sections 6 and 8 are unconstitutional. (*The Society for Propagation of Gospel v. Wheeler*, Fed. Cas. No. 13,156, 2 Gall. 105; *People ex rel. Thorne v. City of San Francisco*, 4 Cal. 127; *Bond v. Munso*, 23 Ga. 597; *Dash v. Van*

Kleeck, 7 Johns. 477, 5 Am. Dec. 291.) "A municipal corporation may, without incurring responsibility, permit sewers and drains to be emptied into a natural watercourse if the flowage thereof is not unreasonably increased." (*Flynn v. Shenandoah*, 19 Pa. Co. Ct. 622; see, also, *Munn v. Mayor etc. of Pittsburgh*, 40 Pa. 364; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; *Church v. People*, 179 Ill. 205, 53 N. E. 554; *Joplin Consolidated Min. Co. v. City of Joplin*, 124 Mo. 129, 27 S. W. 406.) In *Platt Brothers & Co. v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 694, it is said: "The accepted rule of safe tolerance is one part of sewage to twenty parts of pure river water." Some authorities go so far as to say a city has a right to empty its sewage into a natural stream to an extent that will cause a pollution of the waters, rendering them unfit for use and causing damage to lower proprietors, and such damaged parties are not even entitled to compensation; that the city is exercising its governmental function conferred by constitution, and that the health and benefit to the public at large is to be considered in preference to the rights of individuals. (See *City of Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, 48 L. R. A. 707.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1897 the city of Miles City installed a sewer system for the purpose of carrying off the sewage of the city. The outlet of the main sewer was then, and ever since has been, in a slough, which is in fact an arm or branch of the Yellowstone river. At the time of the installation of the sewer system, and for a long time thereafter, water flowed through this slough during most of the time in quantities sufficient to carry this sewage from the outlet off into the main channel of the Yellowstone river; but during the last few years the head or intake of this slough has become so far obstructed that only during high-water seasons is there sufficient water flowing through the slough to carry off the sewage, and for considerable periods of

time this sewage accumulates in the slough near the outlet of the sewer, and during such periods is a constant menace to the health of the inhabitants living near such outlet. To obviate the difficulty Miles City in 1908 prepared to extend the main sewer from its present outfall in the slough on some distance across an island, with the purpose of there discharging the sewage directly into the Yellowstone river, without having purified the sewage in any manner. Acting upon information furnished it, the state board of health called a meeting of the board to consider the matter, and notified the city, which was represented at such meeting by its attorney. At that meeting there does not appear to have been any testimony taken, but the board made an order which recites the calling of the meeting, the appearance of the city by its attorney, and then proceeds: "And it appearing that said river is used as a source of water supply for domestic use by persons residing along said river below said Miles City, and within four days of the natural flowage of the waters of said river, * * * and the said board being fully advised in the premises, and having fully considered the matter, finds and determines that such discharge of said sewage into the Yellowstone river will produce such an unsanitary condition, and be such a pollution of the waters of said stream, as to be dangerous to public health, and believing that the same is contrary to law, wherefore, it is by the state board of health of the state of Montana here ordered that the extension of the outlet of the sewer system of Miles City, Montana, be, and the same is hereby, prohibited. And it is further ordered and directed that the said Miles City, at as early a date as practicable, dispose of the sewage of said city in some sanitary manner, acceptable to the said state board of health." From that order of the board the city appealed to the district court. In perfecting its appeal the city, through its attorney, prepared a statement of facts, and added thereto the grounds upon which the city objected to the order. This statement has since been treated substantially as an agreed statement of facts. In the district court there was not any evidence produced, but counsel for the respective parties stipulated that the slough into

which the present sewer system discharges is a branch or part of the Yellowstone river, and that the only effect of the proposed change would be to alter the point of discharge of the sewer system. Upon this stipulation having been made, the district court entered judgment annulling the order of the board of health, and from that judgment the board has appealed to this court. Since the decision of the district court does not indicate the ground of the court's ruling, the specifications contained in the city's statement on appeal to the district court are presented here; and, while they are six in number, they really present but two principal contentions.

1. It is said that the state board did not hear testimony to determine whether the sewage discharged into the Yellowstone river would pollute the waters of the river. Assuming this to be true, it is not a valid objection to the order made by the board. Section 8, Chapter 177, p. 477, Laws 1907 (section 1566, Revised Codes), authorizes the board to make, or cause to be made, a thorough investigation in a case of this character; and, if in the judgment of the board the public health so requires, the board may make such an order as the one now under review. This section does not contemplate a public trial, but rather an *ex parte* investigation, and the legislature, being the repository of the police power of the state, could designate the state board of health as its agent, and prescribe the manner in which such police power should be exercised. As a precaution, however, against any injustice, section 10 of the Act (section 1568, Revised Codes) provides that any party aggrieved by the order may appeal to the district court. If the board, then, informed itself by any means, the fact that testimony was not taken is altogether immaterial. The order recites that the board was fully advised in the premises, and found that the sewage discharged into the river would pollute the water to such an extent as to produce an unsanitary condition—one dangerous to the public health.

Counsel for the city misapprehend the scope of this statute. The prohibition is against the pollution of the waters of a stream which is the source of water supply. Assuming for the pur-

poses of this appeal, as counsel did upon the oral argument, that the reference in the order of the board is to the city of Glendive particularly, and assuming, further, that the intake of the Glendive water supply is many miles below the outfall of the Miles City sewer, the order of the board, on its face, is still justified; for the prohibition is not directed against polluting the waters of a river at such intake alone, but applies equally against polluting them at such outfall. The prohibition is against polluting the waters at any place within the state, and it is therefore wholly immaterial that the putrescible constituents of the sewage are not carried to the intake of the Glendive water supply, if such be the fact. The state, in the valid exercise of its police power, has said by this statute that hereafter no polluting sewage and no human excrement shall be discharged into any stream which is the source of water supply for a city or town, until such deleterious matter is rendered harmless by some means of sewage purification acceptable to the state board of health. In *City of Durham v. Eno Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A., n. s., 321, the court had under consideration a similar statute, and reached the same conclusion which we have indicated above. In this case there is also considered at great length the general subject of police regulations, sustaining the views hereinafter set forth.

2. It is further contended that the city of Miles City has acquired by prescription the right to discharge its sewage into the Yellowstone river. The seriousness with which counsel for the city have urged this impels us to give it attention. The cases cited in their brief, however, do not sustain them. Those cases refer to rights acquired as against private individuals; but when the city asserts that it has acquired such prescriptive right as against the state, and that it is a right of such character as that against it the police power of the state cannot be invoked, it assumes an altogether unique position. In the first place, a city is but one of the governmental agencies of the state, and as such agent it could not acquire the right by prescription; for the elements of adverseness, exclusiveness, and claim of right are absent during the entire period of the

city's use of the river, and those elements are essential to the establishment of a right by prescription. (*Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111.) Furthermore, the right which the state is attempting to assert through the agency of the state board of health is a public right—a right to protect the health of the people of the state—and as against such public right prescription does not run. (*Commonwealth v. Moorehead*, 118 Pa. 344, 4 Am. St. Rep. 599, 12 Atl. 424; 22 Am. & Eng. Ency. of Law, 2d ed., 1190.) There is yet another reason why the city cannot acquire such a right by prescription as that against it the state may not invoke its police power. It is now generally conceded that the police power is such a power, inherent in the state for the protection of the public, that the state may not waive or divest itself of the power to exercise it. (*In re O'Brien*, 29 Mont. 530, 75 Pac. 196; 8 Current Law, 36; *Portland v. Cook*, 48 Or. 550, 87 Pac. 772, 9 L. R. A., n. s., 733; 1 Abbott on Municipal Corporations, 209.) It would seem to follow, then, as a matter of course, that notwithstanding the length of time the city has enjoyed the privilege of discharging its sewage into the river, the state may, in the interest of the public health and safety, regulate such use, or, if necessary, prevent the continuance of it. Indeed, if the state had consented to the use of the Yellowstone river by Miles City for the purpose of discharging its sewage therein, such consent would not have amounted to more than a license, which the state might revoke whenever public interests require it. (*Portland v. Cook*, above.)

But if it was possible for the city to have acquired the right which it asserts, that fact of itself would not preclude the state from enforcing any reasonable police regulations, even though such regulations called for an abandonment of the right asserted in the manner asserted; for all property is held subject to the right of the state to so regulate and control its use as to secure the general safety and public welfare. (*City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258; Cooley's Constitutional Limitations, p. 830.) And in the proper exercise of this police power one may even be restrained from doing a thing in itself lawful and

right (*City of Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698, 75 Pac. 521), or may have his property destroyed, even though he himself is not at fault (Cooley's Constitutional Limitations, p. 878). In fact the reason for the exercise of this power finds expression in the two maxims, "*Sic utere tuo al alienum non laedas*," and "*Salus populi suprema lex*."

The statute does not deprive Miles City of any property right. It does not forbid the city using the Yellowstone river for the purpose of discharging its sewage, provided the sewage has been subjected to some practical means of purification. The statute looks only to a proper regulation of the use asserted, and not to a denial of the use; and the mere fact that the city was making use of the river for discharging raw sewage into it at the time this statute was enacted, which modifies such use, is not any valid objection to the statute. (Cooley's Constitutional Limitations, 7th ed., Chap. 16; *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, 27 L. R. A. 710.)

3. Upon oral argument it was suggested that the state board attempted to proceed under Chapter 110, page 265, Laws 1907 (sections 1474-1511, Revised Codes), but there is not anything before us to bear out the suggestion. Chapter 110 is the general law creating the state board of health, and defining its powers and duties. The suggestion made is not warranted, for the statement on appeal, prepared by the city attorney, alleges that the board was proceeding under Chapter 177, which is an Act to prevent the pollution of public water supplies.

4. Finally, it is suggested that, since the state board did not produce any evidence before the district court in support of its order, the judgment of the district court must be sustained. It appears that the cause was not set down for trial, or, at least, it was not deemed necessary to take any evidence. Just what view the trial court entertained as to the burden of proof, if that question was suggested, we are not able to know; but, since the statute is couched in prohibitive terms, and, in addition thereto, provides that pending the appeal to the district court the order of the board shall continue in force, unless otherwise

ordered by the board, the conclusion would seem irresistible that the city in this instance had the burden of showing that the order was not justified. This it might have done by showing (a) that the sewage does not contain any human excrement, and that without such excrement it is not of such character and quantity as to pollute the waters of Yellowstone river; or (b) that the sewage had been rendered harmless by being subjected to some practical method of sewage purification satisfactory to the state board of health, or which ought to have been satisfactory to such board. In the absence of a showing of either of these facts the court could not annul the order, unless upon its face the order bore evidence of its own invalidity, which the one now under review does not.

The judgment is reversed, and the cause is remanded to the district court, with directions to proceed to a hearing with the cause in conformity with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE SAVINGS BANK, RESPONDENT, v. ALBERTSON
ET AL., APPELLANTS.

(No. 2,686.)

(Submitted June 17, 1909. Decided July 3, 1909.)

[102 Pac. 692.]

*Promissory Notes—Taking Security—When Bar to Action—
Complaint—Insufficiency—Illegality—Pleading and Proof—
Amendments—Application—Affidavit—Insufficiency—Discre-
tion—Dismissal—Delay.*

Actions—Dismissal—Delay—Discretion—Burden of Showing Error.

1. A motion to dismiss an action on the ground that plaintiff has, without sufficient excuse, failed to prosecute it to final judgment with reasonable diligence, is addressed to the trial court's discretion, and the burden of showing an abuse of such discretion is upon the movant;

therefore, where nothing further appeared in the record than that the motion was made and denied, the supreme court will not interfere.

Same—Dismissal—Delay—Lapse of Time.

2. Mere lapse of time in prosecuting an action to final judgment is not sufficient to justify a dismissal.

Statutes—Adoption from Other State—Construction.

3. Where a statute is adopted from another state, the construction given to it by the supreme court of that state is also adopted.

Promissory Notes—Taking Security—When Bar to Action—Pleading.

4. To constitute the taking of security a bar to an action on a note, under section 6861, Revised Codes, it must be alleged that the security was in the form of a mortgage, or what the law would deem the equivalent of a mortgage; the statute is a limitation upon the rights which usually pertain to property, and its restriction will not be construed to include personal or collateral security, or any form of security not falling within the meaning of "mortgage."

Same—Taking Security—Pleading and Proof.

5. Plaintiff brought suit to recover on a promissory note. Defendants answered by alleging, *inter alia*, that plaintiff had taken "security" for the payment of the note. Section 6861, Revised Codes, provides that where a debt is secured by a mortgage upon real or personal property, recourse must be had to foreclosure proceedings. Defendants offered evidence to show that real estate had been conveyed to plaintiff to secure payment of the note. The court refused the offer. *Held*, that the court did not err, in that the allegation in defendants' answer that plaintiff had taken "security" was insufficient, under the rule declared in paragraph 4 above, to present an issue coming within the purview of the section, and the evidence was therefore irrelevant and immaterial.

Same—Illegality of Contract—Pleading and Proof.

6. Where defendants in an action on a promissory note had not alleged in their pleading that the purpose for which the note was given was illegal, they were properly denied permission to prove its illegal purpose.

Trial—Amendments of Pleadings—Insufficiency of Affidavit—Discretion.

7. The trial court did not abuse its discretion in refusing defendants permission to amend their answer during trial, where the affidavit filed in support of the application did not negative the idea that the facts alleged in the proposed amendment were within the knowledge of defendants and their counsel from the commencement of suit.

Appeal—Conflicting Evidence—New Trial—Review.

8. Where the evidence presents a substantial conflict, the finding of the jury thereon and the court's action in denying a motion for new trial are conclusive upon the supreme court.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the State Savings Bank against Henry Albertson and another to recover on a note. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, defendants appeal. **Affirmed.**

Mr. John J. McHatton, for Appellants.

The Ferrells were engaged in carrying on an illegal business, to-wit, gambling. Hence, there could be no partnership obligation between the appellants and the Ferrells. If this purpose was one against public policy it could not be contended that any contract in connection with it could be enforced. The appellants could not have enforced their claim for one-fifth of the net proceeds, nor could the Ferrells claim any obligation against them whatever. (*Jackson v. Akron Brick Assn.*, 53 Ohio St. 303, 53 Am. St. Rep. 637, 41 N. E. 257, 35 L. R. A. 287; *Sampson v. Shaw*, 101 Mass. 149, 3 Am. Rep. 327; *Dunham v. Presby*, 120 Mass. 285.) That playing margins is against public policy and that the court will not enforce an act against public policy is established. (*Beattie v. Hoyt*, 3 Mont. 140; 9 Cyc. 465, 466; *Morton v. Fletcher*, 2 A. K. Marsh. (Ky.) 137, 12 Am. Dec. 366; 5 Cyc. 744; *Ford v. Gregson*, 7 Mont. 89, 14 Pac. 659; *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883; *Blank v. Nohl*, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; note to *Brown v. Phillips*, 3 L. R. A. 631.) Option contracts are usually, when they refer to stocks, mere disguises for gambling, and where there is no intention on the one side to sell or deliver the property, or on the other to buy or receive it, but merely an intention that the difference shall be paid according to the fluctuation of market values, the contract is wager and void. (*Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. 490; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Sprague v. Warran*, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; *Kingsbury v. Kirwin*, 77 N. Y. 612; *Lester v. Buel*, 49 Ohio St. 240, 34 Am. St. Rep. 556, 30 N. E. 821; *Melchert v. American Union Tel. Co.*, 11 Fed. 193, 3 McCrary, 521; *Morris v. Norton*, 75 Fed. 921, 21 C. C. A. 553; *Waldron v. Johnston*, 86 Fed. 758; *Dunn v. Bell*, 85 Tenn. 587, 4 S. W. 43.) In *Pierce v. Rice*, 142 U. S. 40, 12 Sup. Ct. 130, 35 L. Ed. 925, it is held that notes based on stock gambling transactions are void.

In *Clews v. Jameson*, 96 Fed. 653, 38 C. C. A. 473, it is held that a suit will not be entertained to enforce difference of market and contract price on day of delivery. *Lee v. Boyd*, 86 Ala. 287, 5 South. 491, holds that neither party to a gambling contract can gain interest in negotiable bonds pledged by trustee.

The American rule is that all wagering contracts are illegal and void as against public policy. (*Irwin v. Williar*, 110 U. S. 510, 4 Sup. Ct. 160, 28 L. Ed. 225; *Shain v. Goodwin*, 46 Fed. 567; *Harvey v. Merrill*, 150 Mass. 10, 15 Am. St. Rep. 159, 22 N. E. 49, 5 L. R. A. 205.) Gambling is none the less such because in the guise of legitimate trade. (*Morrissey v. Broomal*, 37 Neb. 785, 56 N. W. 388.) Whether a contract is a wager and void or not is determined by the intent, and not the form of the contract. (*Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 62.) In California there is a constitutional provision, and the court of that state has rendered decisions under it. (*Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 972.) In Georgia it is distinctly held that a lender is not entitled to recover money advanced to aid a borrower in prohibited margin transactions. (*Singleton v. Bank*, 113 Ga. 530, 38 S. E. 947.)

If, as they contend, appellants were to have a share of the profits, and had nothing to do with running the business, then they were not partners. (*Hubbard v. Mulligan*, 34 Colo. 236, 82 Pac. 783; *Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791; *Bates on Partnership*, 158-168; 22 Am. & Eng. Ency. of Law, 15-17; 6 Current Law, p. 912, note 76; *Hanrahan et al. v. Freeman*, 35 Mont. 584, 90 Pac. 793.)

The court erred in refusing to allow defendants to amend the answer. (*O'Toole v. Copeland*, 36 Mont. 344, 92 Pac. 967.)

Messrs. McBride & McBride, and *Mr. Jesse B. Roote*, for Respondent.

Mere knowledge on the part of a person loaning money that the borrower intends to use it by engaging in the purchase of options on grains in the market of another state, or involving

it in wagering or gambling contracts, will not defeat an action by the lender to recover back the amount loaned. (*Jackson v. City National Bank*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; see, also, *Singleton v. Bank of Monticello*, 113 Ga. 527, 38 S. E. 948; *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22; *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659; *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 27, 18 N. E. 687, 5 L. R. A. 432; *Green v. Collins*, 3 Cliff. 499, Fed. Cas. No. 5755; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Lurton v. Gilliam*, 1 Scam. 577, 33 Am. Dec. 430; *Jackson v. Bank*, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657.)

The allowance or refusal to allow amendments is in the discretion of the court, and subject only to review for abuse. (*Billings v. Sanderson* 8 Mont. 201, 19 Pac. 307; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *Stearns v. Martin*, 4 Cal. 228; *Jessup v. King*, 4 Cal. 331; *Canfield v. Bates*, 13 Cal. 606; *Gillan v. Hutchinson*, 16 Cal. 154; *McMinn v. O'Connor*, 27 Cal. 239; *Page v. Williams*, 54 Cal. 562; *Harney v. Corcoran*, 60 Cal. 314; *Weisenborn v. Neumann*, 60 Cal. 376; *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663.) Ordinarily, a party ought not, after having deliberately selected his ground of defense, and finding himself defeated thereon, to be permitted to shift it so as to court the hazard of another battle. (*Barrett v. Kansas & T. Coal Co.*, 70 Kan. 649, 79 Pac. 150; see, also, *Phoenix Ins. Co. v. Washington*, 71 Kan. 777, 81 Pac. 461.) It is not an abuse of discretion for a trial court during the trial of a cause to refuse an amendment to an answer, which sets up a new and additional defense, where no reason is given therefor other than that the trial court refused to allow the evidence desired to be introduced under a general denial. (*Piper v. Choctaw Northern Townsite & Imp. Co.*, 16 Okl. 436, 85 Pac. 965; *Jacobs et al. v. Mexican Sugar Refining Co.*, 115 App. Div. 499, 101 N. Y. Supp. 320.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from a judgment in favor of plaintiff and from an order denying defendants' motion for a new trial. The com-

plaint contains two counts. The first alleges that Fred. M. Ferrell, John J. Ferrell, Henry Albertson, and George Kendall were between December 24, 1900, and May 27, 1901, copartners doing business under the firm names of the Fred. M. Ferrell Company and the John J. Ferrell Brokerage Company; that on January 2, 1901, they caused to be executed and delivered to the plaintiff a promissory note for the sum of \$4,000, signed "Fred. M. Ferrell Co.," and "John J. Ferrell Brokerage Co.," the payment of which was guaranteed by indorsement by Fred. M. Ferrell and John J. Ferrell; and that there is due and unpaid thereon the whole of the principal sum, with interest at the rate of ten per cent per annum, as stipulated therein, since April 4, 1902. In the second count the same allegations are made as to the copartnerships of the defendants, and it is then alleged that the plaintiff between the dates named loaned and advanced to, and for the use of, the copartnerships, on account of overdrafts, moneys to the amount of \$12,240.34, no part of which has been paid, except the sum of \$5,956.35 leaving a balance due and unpaid of \$6,283.99, with interest at eight per cent per annum, the stipulated rate, since May 24, 1901. Judgment is demanded for the amount of these balances, with interest.

The defendants Ferrell filed a general demurrer, and as to them the cause is not yet at issue. Defendants Albertson and Kendall filed a joint answer. They deny generally that they were at any time associated with the defendants Ferrell as copartners or ever transacted any business with them under the copartnerships mentioned or otherwise; that they executed and delivered, or caused to be executed and delivered, the promissory note as alleged by plaintiff; that the plaintiff advanced the moneys to them, or for their use and benefit, by way of overdraft, or that they are indebted to the plaintiff in any amount, by promissory note or otherwise. They allege by way of special defense to the first count that on or about December 24, 1900, they advanced to the defendants Ferrell certain moneys to enable them to conduct the business in which they were then engaged, upon the agreement and understanding that they were

to receive a certain portion of the profits thereof if any were made; that they never had any other connection with the said Ferrells; that they never had knowledge that the plaintiff had loaned any moneys to the Ferrells; that, at the time the loan of money was made upon the promissory note as alleged by plaintiff, it knew that the Ferrells were the only members of the co-partnerships; and that the plaintiff accepted their note and the guaranty indorsed thereon, giving credit to them exclusively. They then continue: "And these defendants allege that they are informed and believe, and on said information and belief say, that said Fred. M. Ferrell and John J. Ferrell gave to plaintiff security and assurance for the payment of said promissory note, and that, upon the same and the credit of said partners, the plaintiff parted with its money and took said promissory note, and did not look to or rely upon, or intend to look to or rely upon, the credit or responsibility of these defendants, or either of them, in advancing said money, or in taking said promissory note." Substantially the same special allegations are made in answer to the second count, except as to the personal guaranty by the Ferrells. The reply admits that the plaintiff took security for payment both of the note and the amount of the overdraft, but denies generally all the other allegations. The verdict and judgment were for the amounts demanded, with interest. Pending the motion for a new trial, Kendall died, and F. J. Morse, administratrix upon his estate, was substituted as defendant in his stead. Of the great number of errors assigned, only a few are of sufficient importance to demand special notice.

1. At the beginning of the trial, on April 11, 1908, counsel for appellants moved the court to dismiss the action on the ground that it had not been prosecuted with reasonable diligence. Upon the denial of this motion the first assignment is made. It is properly conceded that such a motion is addressed to the discretion of the trial court, and that its action thereon will not be disturbed in the absence of an apparent abuse of power in that behalf. The rule is generally recognized that the courts have the power independently of such a provision as is

found in our Code (Revised Codes, sec. 6714) or a rule of court to dismiss an action whenever it appears that the plaintiff has, without sufficient excuse, failed to prosecute it to final judgment. (*Dupuy v. Shear*, 29 Cal. 238; *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704; *Colorado Eastern Ry. Co. v. Union Pac. R. Co.*, 94 Fed. 312, 36 C. C. A. 263; *Ashley v. May*, 5 Ark. 408; 14 Cyc. 444.) The power being a discretionary one, the burden is upon the appellant to show an abuse of it. In *Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213, it was said: "In such cases it has not been the practice of this court to interfere except where the district court has abused the discretion which it necessarily exercises in this class of cases; and, in invoking the aid of this court, it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion. Until the contrary appears, the presumption is the discretion of the district court was rightfully exercised." Nothing further appears in the transcript than that the motion was made and denied. Evidently counsel relied solely upon the fact, apparent from the files and records of the district court and within the knowledge of the court, that the action had been pending since the filing of the complaint on July 31, 1903, and deemed the lapse of time sufficient to move the court's discretion. Mere lapse of time is not sufficient in itself to justify a dismissal. Since counsel relied solely upon the knowledge of the court upon which to guide its discretion, it had the right to take into consideration any fact known to it, which in its opinion furnished a sufficient reason for denying the motion. If the record revealed the fact that the defendants had acquiesced in or caused the delay—and, so far as we are informed, it did—this was a matter which the court should not have overlooked. In any event, there is nothing before us to show that the court acted arbitrarily. Hence a case is not presented calling for interference by this court.

2. The second contention requiring notice is that the plaintiff should not have been allowed to recover in this action because it is alleged in the answer, and admitted in the replication, that the plaintiff accepted security from the defendants Fer-

rell. During the trial the defendants offered evidence to show that their codefendants Ferrell, at the time the note was given to the plaintiff, conveyed to it certain real estate situated in Butte, to be held by it to secure the payment, not only of the note, but of any overdraft made. Upon objection this was excluded as not relevant to any issue made by the pleadings. The court also instructed the jury, in effect, that the taking of security from the Ferrells as alleged could not affect the plaintiff's right to recover as against defendants Kendall and Albertson. The assignment is made upon the action of the court in these particulars. Counsel insist that the defendants should have been allowed to show that the security admitted to have been taken by the plaintiff was in effect a mortgage upon real estate, and thus to have made out a defense requiring the court to dismiss the action under section 6861, Revised Codes, which, in part, declares: "There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter," etc. The chapter containing this section relates to the foreclosure of mortgages.

The statute was adopted from the Code of Civil Procedure of California, and with it was adopted also the construction given to it by the supreme court of that state. (*Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086.) In *Merced Bank v. Casaccia*, 103 Cal. 641, 37 Pac. 648, the court said of it: "The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor." Again, in the same case, the court said: "This statute is a limitation upon the rights which usually pertain to property, and the restriction will not be carried beyond the obvious import of the language used." Of the correctness of this view we have no doubt. As pointed out in *Brophy v. Downey*, *supra*, no obligation rests upon the plaintiff in any case in stating his cause of action to show

whether or not the defendant has executed a mortgage to secure the performance of the contract. The plaintiff being *prima facie* entitled to maintain his action, the fact that the obligation upon which he sues is secured by a mortgage is a matter of defense, and the burden rests upon the defendant to make it appear by his pleading, and in doing so he must bring himself within the purview of the statute. It is not sufficient to bar the action that it appears that security has been given for the obligation. The security must appear to be in the form of a mortgage, or, adopting the most liberal view, to be what the law would deem the equivalent of a mortgage. The restriction cannot be construed to include personal or collateral security or any other form of security not falling within the meaning of that term.

The allegations contained in the answer clearly do not present an issue coming within the purview of the statute. They amount merely to a statement that the plaintiff had taken security from the Ferrells. This is not a sufficiently definite and specific statement of facts to present any defense, and even a denial of it would not have made a material issue. The admission of it by plaintiff in its replication does not better the situation. Whatever may have been the theory upon which the evidence was excluded, the ruling was correct; for it was neither relevant nor material to any issue in the case. For the same reason the instructions on the subject were properly submitted.

In what we have said so far we have assumed that the appellants would have been entitled to plead and prove as a bar to the action against them the fact that, when the action was commenced, the plaintiff held mortgage security for the debt, given by the Ferrells upon real estate owned by them individually. Whether this would bring the appellants, who have no interest in the property and had nothing to do with the hypothecation of it, within the equity of the statute we do not decide, because the question is not in the case.

3. It is said that the court erred in refusing to admit evidence tending to show that at the time the plaintiff made the

loans to the defendants it knew that they were engaged in carrying on an illegal business, to-wit, gambling, by making purchases and sales of mining stocks for their customers exclusively on margins. It may be assumed, for present purposes, that the business conducted by the defendants was of such a character as to render the copartnership contracts void, and also all contracts made by the copartnerships with third persons having direct reference to, and in furtherance of, them. It may be further assumed that the plaintiff made the loans for the express purpose of being used in the illegal business, and that the evidence offered would have established the fact beyond question. Yet there was no issue on the subject in the pleadings. Hence the evidence was not relevant. The complaint on its face does not show that the purpose for which the loans were made was illegal; nor was it necessary for the plaintiff to go further into the subject of consideration in offering its proof in order to make out a case upon which it could recover, than to show a loan to the copartnerships. It was then incumbent upon the defendants, in order to avoid the *prima facie* case thus made, to show the illegal purpose of the contract, if they could, and to this end it was incumbent upon them to present the facts in their pleading by way of special defense in the nature of a plea of confession and avoidance. (Bliss on Code Pleading, sec. 330; Pomeroy's Code Remedies, 4th ed., sec. 584; Bates' Pleading and Practice, P. & F., 1292.)

4. During the trial counsel for the defendants prepared and asked leave to file an amendment to the answer, alleging the purpose for which the loans were made and knowledge on the part of the plaintiff, and also showing that the security given for them by the Ferrells was a mortgage upon real estate in Butte. The application was supported by an affidavit by counsel, to the effect that at the time the original answer was filed he believed the illegal character of the contract could be shown under the denials therein. As to the omission therefrom of specific allegations touching the character of the security, nothing is stated further than that the amendment is tendered in good faith at the first opportunity. So far as appears, the facts

alleged in the proposed amendment were within the knowledge of the defendants and their counsel from the time the complaint was filed. An amendment incorporating them would have presented issues entirely new, and its allowance would have been made without a showing of any substantial reason for the delay in presenting it. Under the circumstances there was no abuse of the discretion to be exercised in such cases. (*First Nat. Bank v. How*, 1 Mont. 604.)

5. Some contention is made that the evidence is insufficient to sustain the finding that the appellants were members of the copartnerships. In this contention there is no merit. The evidence on this point presents a substantial conflict. The finding of the jury and the action of the district judge thereon in denying the motion for a new trial are conclusive upon this court.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
OCTOBER TERM, 1909.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

PRICE ET AL., APPELLANTS, v. STIPEK, RESPONDENT.

(No. 2,577.)

(Submitted October 5, 1909. Decided October 11, 1909.)

[104 Pac. 195.]

*Sales—Contracts—Construction—Subject Matter—Reasonable
Certainty—When Unenforceable.*

Contracts—Subject Matter—How to be Expressed.

1. In order to constitute a valid contract, the subject matter of the agreement must be expressed by the parties in such terms that it can be ascertained with a reasonable degree of certainty what their intentions were.

Same—Sales—When Agreement Unenforceable.

2. *Held*, under section 4999, Revised Codes, that where defendant requested plaintiff firm, at the solicitation of one of its traveling salesmen, on one of its printed order blanks covering many pages and containing a large variety of all kinds of jewelry of different quality and price, to ship to him "the goods listed in this order upon the terms named therein," and it could not be determined therefrom how many articles of any particular kind or class had been ordered or what prices were to be paid, the memorandum of sale was so indefinite and uncertain in its terms as to make it unenforceable at law.

Appeal from District Court, Dawson County; C. H. Loud, Judge.

ACTION by Milbert F. Price and another, copartners doing business as the Puritan Manufacturing Company, against J. J. Stipek. From a judgment for defendant, on demurrer to the complaint, plaintiffs appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. Donald Campbell, for Appellants.

Section 5017 of the Revised Codes reads as follows: "The following contracts are invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent," etc. What would be a note or memorandum of a contract? The statute offers no definition. Clearly it is something less in its terms than a formal, written contract or agreement; it is an alternative of a lesser nature. Webster says a note is "a minute, a memorandum, or a short writing to assist the memory." A memorandum is defined to be a note to help the memory. (*Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565; *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581; *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 896.) We take it, then, that the note or memorandum required is a mere skeleton agreement setting up the name of the party selling, the name of the purchaser, the selling price, a description of the articles sold, the whole signed by the party to be charged. No one of these several elements is questioned, save the description. It is only necessary that the subject matter of a contract falling within the operation of the statute of frauds be described in such memorandum in such manner as to make it capable of certain identification, and if the description therein set forth points to specific property, oral evidence is admissible to identify that property. The maxim of *Certum est quod certum reddi potest*, is applicable. (20 Cyc. 270; *Burgess etc. v. Bloomfield*, 180 Mass. 283, 62 N. E. 367; *American etc. Mfg. Co. v. Midland Steel*

Co., 101 Fed. 200; *Darnell v. Lafferty*, 113 Mo. App. 282, 88 S. W. 784; *Borum v. Swift*, 125 Ga. 198, 53 S. E. 608.)

Mr. C. C. Hurley, for Respondent.

In order for a memorandum to be sufficient to comply with the statute of frauds, it must contain essential terms of the contract with such a degree of certainty, that it may be understood without recourse to parol evidence to show the intention of the parties. (Browne's Statute of Frauds, 4th ed., sec. 371.) It must be shown who are the contracting parties; it must intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged and disclose the terms and conditions of the agreement. (*Catterlin v. Bush*, 39 Or. 496, 59 Pac. 706, 65 Pac. 1065; *Elliot v. Barrett*, 144 Mass. 256, 10 N. E. 820; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360.) The memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by reference contained in it to some other writing, without recourse to parol proof to supply them. (20 Cyc. 258; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; *Salomon v. McRae*, 9 Colo. App. 23, 47 Pac. 409; *Abba v. Smyth*, 21 Utah, 109, 59 Pac. 756; *Ellis v. Denver, L. & G. R. R. Co.*, 7 Colo. App. 350, 43 Pac. 457; *Broadway Hospital & Sanitarium v. Decker*, 47 Wash. 586, 92 Pac. 445.) The memorandum in the case at bar is not such a one as would be prepared in an honest business transaction, showing the sale of merchandise, but it is rather such a memorandum as would be prepared by those who are engaged in a dishonest and fraudulent business. (*Puritan Mfg. Co. v. Westermire*, 47 Or. 557, 84 Pac. 797; *Johnson Co. Savings Bank v. Rapp*, 47 Wash. 30, 91 Pac. 382.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action alleges: "That on July 17, 1905, at defendant's place of business at said city of Glendive, plain-

tiff's traveling agent solicited and defendant gave his order, written upon plaintiffs' regular form, for certain articles of jewelry of the value of three hundred eighty (\$380) dollars, * * * and then and there made and executed, subject to plaintiff's approval and acceptance, a certain memorandum of sale of said articles of jewelry, * * * a copy of which memorandum of sale is hereto attached and annexed and marked 'Exhibit A,' and is hereof made a part." It is then alleged that this memorandum was received by the plaintiffs and approved by them; that they delivered the goods "in said memorandum of sale set forth" to a common carrier, consigned to the defendant at Glendive; and that they have fully performed all the terms of the memorandum by them to be performed, but that defendant has neglected and refused to pay for the goods or any of them. The prayer is for a judgment for \$380 and legal interest thereon from July 27, 1905. Attached to this complaint is the memorandum marked "Exhibit A." The defendant interposed a general and special demurrer, which was sustained by the trial court, and plaintiffs, having declined to plead further, suffered judgment to be rendered and entered against them, from which judgment they have prosecuted this appeal.

In the judgment it is recited that in sustaining the demurrer the trial court held that the complaint does not state facts sufficient to constitute a cause of action. Whether it does or does not is to be determined by reference to the legal effect, if any, of the so-called memorandum. Counsel in their briefs have treated the matter as though the complaint alleges that an oral contract for the sale of goods amounting to more than \$200 was made, and that "Exhibit A" was intended as a note or memorandum of such contract, and the argument is then directed to the question: Is this "Exhibit A" a sufficient note or memorandum to take the case out of the operations of the statute of frauds? If that question was before us, we would probably reach the same conclusion which we reach now; but that question is not before us.

The allegation of the complaint is that the defendant gave his order for the goods by virtue of his having signed this "Exhibit A"; the complaint is not susceptible of any other construction. And this brings us to a consideration of the question: Is this "Exhibit A" such an instrument that upon approval by plaintiffs it evidences a contract which can be enforced at law? The exhibit is a unique document. It covers five and one-half pages of the transcript, and to set it forth at length would extend this opinion unnecessarily. Much of it is devoted to extravagant advertising of the goods mentioned in it. For the purposes of this appeal, it will be sufficient to copy portions of one paragraph and the concluding portion of the memorandum, as follows: "*Individuality*. For the purpose of giving our goods an individuality not enjoyed by other manufacturers, and to so far as possible exclude the general mixing of the goods of various factories, which, to a certain extent, precludes the possibility of building up a reputation among the customers, we place the following factory line of rolled gold plate, gold front, gold filled, sterling silver and oxidized finished articles in assorted styles and patterns, on our most liberal and beneficial conditions. Belt buckles or pins from 15c to \$2 each; charms and lockets from 15c to \$2.50 each; pin sets (three in set) from 15c to \$1.25 per set; dress buttons sets (three in set) 16c to \$1 per set; single studs 50c each." This paragraph then continues with an enumeration of a large number of articles at prices ranging from 8 cents to \$2.75 each, concluding as follows: "Hat pins from 10c to 50c each; bracelets from 85c to \$2.25 each. Delivered f. o. b. transportation companies and amounting to \$380.00, which can be paid one-fourth in 2 months, one-fourth in 4 months, one-fourth in 6 months and one-fourth in 8 months, without interest, if acceptances are given within 10 days from date of invoice; otherwise, terms are net cash 15 days or 6 per cent. discount cash 10 days." The last paragraph of the exhibit reads as follows:

"P. O. Glendive, State Mont. County Dawson. Date July 17, 1905.

"Puritan Mfg. Co., Factory:

"Please ship at your earliest convenience the goods listed in this order upon the terms named therein and no others, all of which I fully understand and approve. Express Office Glendive, Mt.

"J. J. STIPEK, Owner of Store."

It is an elementary rule of the law that, to constitute a contract, the subject matter of the agreement must be expressed by the parties in such terms that it can be ascertained with a reasonable degree of certainty. (7 Am. & Eng. Ency. of Law, 2d ed., 116.) In *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371, the court said: "The law is too well settled to admit of doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law. It is hardly necessary to cite any of the numerous authorities that sustain this plain legal proposition."

Doubtless this "Exhibit A," when signed by the defendant, was intended to be an offer which upon acceptance by the plaintiffs would constitute a contract; and such result would have followed if the defendant had indicated what it was he proposed to purchase. Upon the subject of offer and acceptance Page, in his work on Contracts, says: "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable." (1 Page on Contracts, sec. 28.) And Parsons

on Contracts, speaking of agreements for the sale of personal property, announces the same rule in the following language: "The price to be paid must be certain, or so referred to a definite standard that it may be made certain. * * * And the thing sold must be specific, and capable of certain identification." (1 Parsons on Contracts, 9th ed., *p. 524.)

With these elementary principles before us, we search this instrument in vain for an answer to any of the following inquiries: How many articles of any particular kind or class are ordered? What is the particular quality of the articles intended to be purchased, and what prices are to be paid for the several articles? Did the defendant intend to order some articles of every description listed by plaintiffs in this "Exhibit A," or did he intend to order only a portion of them? Did he intend to order belt buckles worth fifteen cents each, or belt buckles worth \$2 each? This exhibit does not itself answer any of these inquiries, and neither does it refer to any other source from which the information can be obtained. The instrument is clearly of that character which in section 4999, Revised Codes, is declared to be void in the following language: "Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable, the entire contract is void."

Because this instrument is so indefinite and uncertain in its terms that the intention of the parties cannot be ascertained, we hold that it is not a contract enforceable at law, and that the complaint, based upon the alleged breach of it, does not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE DAVIS' ESTATE.

(No. 2,675.)

(Submitted October 6, 1909. Decided October 23, 1909.)

[104 Pac. 521.]

*Executors and Administrators—Attorneys' Fees—Allowance—Review—Discretion.***Executors and Administrators—Allowance of Attorneys' Fees—Discretion.**

1. Where the record on appeal from an order allowing the sum of \$3,000 to an administrator for attorneys' fees, on a claim for \$21,500, did not contain any testimony as to what the legal services were reasonably worth, the action of the district court cannot be said to have been in abuse of its discretion.

Same—Attorneys' Fees—Apportionment of Amounts Allowed.

2. Where the sole question before the district court was what reasonable amount should be allowed to an administrator for attorneys' fees rendered to the estate represented by him, the court was not required to apportion the amount awarded among the different attorneys who performed the services.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

JUDICIAL SETTLEMENT of the estate of Andrew J. Davis, deceased. From an order allowing the administrator with the will annexed \$3,000 as reasonable disbursement for attorneys' fees, the administrator appeals; and from an order overruling objections to the administrator's account, as amended, the objectors appeal. Order affirmed. Objector's appeal dismissed.

Cause submitted on briefs of counsel.

Messrs. Mattison, Cavanaugh & Poor, for Appellant, John H. Leyson, Administrator.

Messrs. Clayberg & Horsky, and Messrs. Gunn & Rasch, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The only question involved in this appeal is whether the district court of Silver Bow county abused its discretion in allowing the administrator, with the will annexed, of the estate of A. J. Davis, deceased, the sum of but \$3,000 as a proper and reasonable disbursement for attorneys' fees. There were filed with the administrator two claims, viz., one of \$12,500 for legal services of Messrs. Forbis & Mattison from May 1, 1901, to November 1, 1904, at the rate of \$5,000 per year, and another of Charles Mattison, Esq., of \$9,000 for services from November, 1904, to November, 1907, at the rate of \$3,000 per year. The court allowed \$3,000 for the entire period covered by the two claims. After Mr. Mattison had testified as to what services were performed by him and by the firm of Forbis & Mattison, the matter was submitted to the court to fix the reasonable value of such services. The court fixed \$3,000 as aforesaid, and the administrator has appealed from that portion of the order settling his ninth annual account which fixes the amount of attorneys' fees to be allowed.

It is not for this court to say what, in its opinion, was the reasonable value of these services. Indeed, under the testimony, the court would be unable to do so, for the reason that there is in the record no testimony as to what the services were reasonably worth. If we should increase the sum allowed by the district court, it would simply be substituting an amount arbitrarily fixed by us for one determined upon by that court. The court below was peculiarly fitted to pass upon the question submitted to it. Nearly all of the services for which compensation was claimed were performed during the course of administration in that court, and the judge of that tribunal ought to have the best knowledge of the amount that should be allowed therefor out of the estate. Unless we can say that the court abused its discretion, we may not interfere with its judgment, and upon the record presented we cannot so decide.

It is suggested that the district court should have passed upon the merits of the respective claims, and should have apportioned

the amount awarded; but we find no error in this regard. The question presented did not arise between the claimants and the estate, but rather the sole question was what, in view of all the circumstances, was a reasonable amount to allow the administrator to pay out of the trust funds in his hands, for services rendered to him, by attorneys, in his representative capacity. The district court determined this question, and, as we cannot disturb that determination, the order appealed from is affirmed.

The record discloses an appeal, also, by those parties to this proceeding who filed objections to the administrator's account, from the order of the court approving the account, after fixing the amount of the attorneys' fees. This appeal has been abandoned and is dismissed. The administrator with the will annexed shall pay all costs of the appeals, save one-half of the clerk's fees in this court, which the objectors shall pay.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

GOLDEN, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO., APPELLANT.

(No. 2,659.)

(Submitted October 5, 1909. Decided October 23, 1909.)

[104 Pac. 549.]

Removal of Causes—Petition—Failure to File in Time—Waiver—Jurisdiction—Presumptions—Evidence—Railroads—Trespassers—Personal Injuries—Instructions.

Removal of Causes—Diverse Citizenship—Petition—Failure to File in Time—Waiver.

1. In a personal injury action brought jointly against a railway company (citizen of another state) and one of its employees (a citizen of Montana, upon whom service of summons had never been had), on the day set for trial both parties announced that they were ready for trial, counsel for defendant company then knowing that its codefendant was not subject to the court's jurisdiction. After the cause had proceeded to the point where plaintiff was about to rest his case, counsel

39	435
41	320
39	435
40	407

for the railway company filed a petition for removal of the cause to the federal circuit court, on the ground that its codefendant was present in court, but that plaintiff refused to serve him with process, that such refusal showed that the action against both defendants had been brought in bad faith so as to prevent removal, and that the cause was then one wholly between citizens of different states, and therefore removable. Upon objection that the petition was presented too late, the motion was denied: *Held*, that the announcement by plaintiff that he was ready for trial amounted to notice to defendant company that he had elected to proceed against it alone; that the cause thus became at once removable because of the diverse citizenship of the parties; and that by failure to then file its petition for removal, defendant waived the privilege granted by the federal statute (U. S. Comp. Stats. 1901, secs. 2, 8, pp. 509, 510.)

Same—Jurisdiction of State Court.

2. Every court has the power to determine the question of its own jurisdiction, such determination being subject to review by the courts which have jurisdiction for that purpose; and this rule applies to the right of a state court to determine its jurisdiction upon the filing of a petition for removal of the cause to the federal court.

Same—Removal After Appeal—Jurisdiction of Supreme Court.

3. The contention that the state supreme court should either reverse the action of the district court in refusing to remove the cause to the federal court, or refrain from action, because the latter court, since the filing of the record on appeal, had taken jurisdiction as evidenced by an order overruling a motion of plaintiff to remand it to the district court, has no merit, since it may not be assumed that the lower court erred merely because of the action taken by the federal court; nor does it necessarily follow that the latter tribunal, in taking jurisdiction, did so properly.

Evidence—Admission of Fact Presumed.

4. Error cannot be predicated upon the admission of evidence to establish a fact which may be presumed to exist.

Railroads—Brakemen—Scope of Authority—Ejecting Trespassers.

5. The presumption obtains that a brakeman on a freight train has, *prima facie*, authority, by virtue of his employment, to eject trespassers therefrom; therefore, where defendant railway company, in an action seeking damages for injuries sustained by plaintiff in being ejected from one of its freight trains, did not offer any rebutting evidence on the question of the duties of a brakeman, it could not complain of the admission of parol and documentary evidence, in the shape of printed rules and bulletins by the company, touching such duties.

Same—Ejecting Trespassers—Evidence—Sufficiency.

6. Evidence, in an action against a railway company for injuries caused to plaintiff in being ejected from a freight train by one of defendant's brakemen, *held* sufficient to go to the jury on the question of the identity of the person who ejected plaintiff.

Same—Ejecting Trespassers—Instructions—Submitting Questions of Law—Harmless Error.

7. Plaintiff having testified that, while riding on top of a freight-car, defendant's brakeman forced him, under threats of violence, to jump from the moving train, and the court in other portions of its charge having assumed, with defendant's acquiescence, that the brakeman's conduct was unlawful, an instruction that if plaintiff was on top of the car he was a trespasser, and that defendant could prevent

such trespass "by lawful means," could not have been prejudicial to defendant as leaving the question of law, what constituted the lawful means defendant's employees could resort to in ejecting trespassers, to be answered by the jury.

Appeal from District Court, Missoula County; Henry L. Myers, Judge.

ACTION by Michael Golden against the Northern Pacific Railway Company and another. From a judgment for plaintiff and an order denying a motion for new trial, defendant named appeals. Affirmed.

There was a brief by *Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines*, in behalf of Appellant; *Mr. Wallace* arguing the cause orally.

The foundation of the claim of error with regard to the specifications made is the refusal of the trial court to stay proceedings therein upon the filing of appellant's petition for and bond on removal to the circuit court of the United States; for if the petition and bond were sufficient in form and were filed in time, all the subsequent proceedings in the state court were of no effect. (*Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 509, 39 L. Ed. 517; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 89; *Powers v. Railway Co.*, 169 U. S. 92, 42 L. Ed. 673; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 356; *Insurance Co. v. Dunn*, 19 Wall. 214, 22 L. Ed. 68; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.) Under the removal statute, as is settled by the decisions of the supreme court of the United States construing it, all that it is competent for the state court to do is to determine, from the face of the record whether a case for removal has been made; any question of fact, such as citizenship, the existence of fraud, and the like, is solely for the determination of the circuit court to which the cause is removed. (*Carson v. Hyatt*, 118 U. S. 287, 6 Sup. Ct. 1050, 30 L. Ed. 167; *Burlington etc. Ry. Co. v. Dunn*, 122 U. S. 515,

7 Sup. Ct. 1262, 30 L. Ed. 1159; *Crehore v. Ohio etc. Ry. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Railway Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Railway Co. v. White*, 111 U. S. 134, 4 Sup. Ct. 353, 28 L. Ed. 378.)

Our claim was and is that the joinder of McCarthy as a defendant was not made in good faith, and was fraudulent; and that by reason of this fraud on plaintiff's part we were prevented from exercising our right of removal at an earlier date than the time at which we presented the petition, which time was the earliest possible opportunity. Under these circumstances, the court erred in denying the petition. (*Yarde v. Railway Co.*, 57 Fed. 913; *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Remington v. Railway Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; *Railway Co. v. Hermann*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Guarantee Co. v. Bank*, 80 Fed. 766; *Mattoon v. Reynolds*, 62 Fed. 417; *Hukill v. Railway Co.*, 65 Fed. 138; *Speckart v. Bank*, 85 Fed. 12.)

The burden of proving that brakemen were authorized to eject trespassers from trains was upon plaintiff; there is no presumption that a brakeman has such authority. (*Corcoran v. Railway Co.*, 56 Fed. 1014, 6 C. C. A. 231; *Faber v. Railway Co.*, 118 Mo. 81, 22, S. W. 631, 20 L. R. A. 354; *Railway Co. v. Brackman*, 78 Ill. App. 141; 10 Ency. of Evidence, p. 508; *Randall v. Railway Co.*, 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666.)

Messrs. Hall & Patterson filed a brief in behalf of Respondent; *Mr. J. E. Patterson* arguing the cause orally.

A petition to remove must be filed at the first opportunity, or it is waived. (*Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; see, also, *Kansas City etc. R. Co. v. Daughtry*, 138 U. S. 303, 11 Sup. Ct. 306, 34 L. Ed. 963.) The petition for removal, while setting up as a fact that its codefendant was not served, contains no allegation whatever to the effect that such defendant had not appeared in the action. Without such

an allegation in the petition it is impossible to determine whether or not the question of service was material, and the sufficiency of the petition must be determined as it stood when filed. (*Offner v. Chicago & E. R. Co.*, 148 Fed. 202, 78 C. C. A. 359.) The appellant, in its petition for removal, attempted to set out facts constituting fraud; the facts set forth are not sufficient to warrant such a deduction. When the petition and record show the action was in fact joint, without dispute, as in this case, the joinder was lawful and proper, and could not present a question of fraud. (*Alabama G. S. R. Co. v. Thompson*, 200 U. S. 215, 26 Sup. Ct. 161, 50 L. Ed. 441; see, also, *Union Terminal Co. v. Chicago B. & Q. R. Co.*, 119 Fed. 210; *Louisville etc. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 134, 21 Sup. Ct. 67, 45 L. Ed. 121.) The motive actuating the plaintiff in bringing the suit against both defendants cannot be relied on as a ground for removing a case. (*Deere etc. Co. v. Chicago, M. & St. P. Ry. Co.*, 85 Fed. 879; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 144 N. C. 352, 57 S. E. 5, 9 L. R. A., n. s., 276.) Whether a separable controversy exists is not to be determined from the allegations of the petition. (*Wilson v. Oswego Township*, 151 U. S. 67, 14 Sup. Ct. 259, 38 L. Ed. 70; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; *Hazard v. Robinson*, 21 Fed. 193; *Fogarty v. Southern Pac. Ry. Co.*, 123 Fed. 973; *Elkins v. Howell*, 140 Fed. 157; *Louisville etc. R. R. Co. v. Wangelin*, 132 U. S. 601, 10 Sup. Ct. 203, 33 L. Ed. 474; see, also, *Seattle & M. R. Co. v. State*, 52 Fed. 595; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269.)

Failure to serve one of two joint defendants has no effect on the defendant served, or on the question of removal. (*Ames v. Chicago S. F. & C. R. Co.*, 39 Fed. 886; *Patchin v. Hunter*, 38 Fed. 52; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Offner v. Chicago & E. R. Co.*, 148 Fed. 202, 78 C. C. A. 359; see, also, *Plymouth etc. Min. Co. v. Amador etc. Canal Co.*, 118 U. S. 270, 6 Sup. Ct. 1034, 30 L. Ed. 232; *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 749.)

The district court was not bound to surrender its jurisdiction until a case was made which on the face of the record showed that the petitioners were in law entitled to a removal. (*Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. 743, 28 L. Ed. 1150; *Mayer v. Denver T. & F. T. W. R. Co.*, 41 Fed. 724; *Stone v. South Carolina*, 117 U. S. 432, 6 Sup. Ct. 799, 29 L. Ed. 962.)

The authority of a brakeman on a freight train to put off trespassers is not required to be proven, and we contend that the court should take judicial notice of the fact trainmen, especially brakemen, are required, as a part of their duties, to eject trespassers from freight trains. (*Kansas City, Ft. S. & G. R. Co. v. Kelley*, 36 Kan. 555, 59 Am. Rep. 596, 14 Pac. 172; *Lake Erie & W. R. Co. v. Mathews*, 13 Ind. App. 355, 41 N. E. 843; *Brevig v. Chicago, St. P., M. & O. Ry. Co.*, 64 Minn. 168, 66 N. W. 403; *Texas & P. Ry. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 80; *O'Branion v. Missouri Pac. Ry. Co.*, 65 Kan. 352, 69 Pac. 353; *McKeon v. Railroad Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329; 9 Am. & Eng. R. R. Cas. 136; *Johnson v. Chicago etc. Ry. Co.*, 116 Iowa, 639, 88 N. W. 811; *Bjornquist v. Boston & A. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; *Johnson v. Chicago etc. Ry. Co.*, 123 Iowa, 224, 98 N. W. 642; *Illinois C. R. Co. v. West*, 22 Ky. Law Rep. 1387, 60 S. W. 290.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was instituted by plaintiff to recover damages for a personal injury to himself, which he alleges was caused by the defendants by willful, wanton, and reckless negligence in ejecting him from one of the freight trains of the defendant railway company. It is alleged that the defendant McCarthy was on the morning of June 23, 1906, in the employ of the railway company, and that he by force and violence ejected the plaintiff from one of its freight trains while it was in rapid motion, and thus caused him to fall under the wheels, whereby he suffered the loss of his

right leg. The issues tried arose upon the denials in the answer of the defendant railway company and its plea of contributory negligence on the part of the plaintiff.

The plaintiff is a citizen of Montana, as was also the defendant McCarthy, at the time the injury occurred and at the time the action was brought. The defendant was then in the employ of the railway company as a brakeman. The railway company is a citizen of the state of Wisconsin. McCarthy was never served with summons, nor did he at any time by voluntary appearance submit himself to the jurisdiction of the court, though he was present during the trial, and testified in behalf of the railway company. On the second day of the trial, and after it had proceeded to the point when counsel for plaintiff were about to conclude the introduction of plaintiff's evidence in chief, counsel for the railway company stated to the court that defendant McCarthy was present in court and could be served with summons, and demanded of counsel for plaintiff to be informed whether it was their intention to serve him and have the cause proceed against him also. Thereupon a colloquy took place between the trial judge and counsel. Counsel for the railway company insisted that this defendant had a right to have the cause proceed against both defendants jointly, since they were charged jointly in the complaint, and that a refusal by counsel for plaintiff to have summons served and to have the cause so proceed would demonstrate that the action had been brought against the defendants jointly in bad faith, and for the sole purpose of preventing the removal of the cause to the circuit court of the United States as a separate controversy between citizens of different states. Objection was made to further proceedings in the cause until service of summons had been made and this defendant properly impleaded. Counsel for plaintiff stated that they had already caused *alias* summons to be issued, and that they intended to have service of it made, but intended to do so at their own pleasure, and insisted that plaintiff was entitled to have the trial proceed against the defendant railway company notwithstanding defendant McCarthy had not been

served. The judge stated that the court had no power to compel service of summons, and that it required more than a mere objection to stay proceedings, and thereupon overruled the objection. Counsel for the railway company then presented a petition asking for a removal of the cause to the circuit court of the United States for the district of Montana, accompanied by a good and sufficient bond such as is required by the federal statute. After stating the diverse citizenship of the plaintiff and the railway company and the character of the action, it alleged, in substance, that the allegations of joint wrong by the railway company and defendant McCarthy set forth in the complaint were false in fact and made in bad faith to prevent removal to the federal court; that no service of the summons had theretofore been made upon the defendant McCarthy, the failure to make it having been attributed by plaintiff to the fact that McCarthy had been absent from the state; that though McCarthy had been present in court since the trial began, nearly two days, and this fact had been known to plaintiff, yet plaintiff had refused to serve him with summons; that because of the allegations in the complaint of joint wrong by defendants, and because of the reasons assigned by plaintiff for failure to serve McCarthy with summons and put him upon his defense with the railway company, it had theretofore been impossible and improper to petition for removal of the cause; that it then appeared for the first time that McCarthy had been made a party defendant fraudulently and in bad faith in order to prevent a removal of the cause; that, in fact, the action had been brought against the railway company alone; that it presented a controversy wholly between citizens of different states, to-wit, between the plaintiff and the railway company, and that it was therefore removable, under the federal statute, to the circuit court of the United States. Upon objection by counsel for plaintiff that the petition was presented too late, the court directed the trial to proceed, thus retaining jurisdiction of the cause over the protest and objection of the railway company. The plaintiff had verdict for \$5,000. From the judg-

ment entered thereon and from an order denying its motion for a new trial, the defendant railway company has appealed. The validity of the judgment is assailed on the grounds that the court erred in refusing to surrender jurisdiction of the cause upon the filing of the petition for removal, in its rulings upon certain questions of evidence during the trial, and in the instructions submitted to the jury. The contention is also made that the evidence is insufficient to sustain the verdict.

1. As to the propriety of the first contention there can be no doubt, if the petition was sufficient and was filed in time; for there is no question but that the bond was sufficient. In addition to the contention that the petition was filed too late, it is also urged, with some reason, by counsel for plaintiff, that it contains no sufficient allegation of fact, but conclusions of law only, and for this reason was properly disregarded by the trial court. For present purposes we shall assume that the statements of fact contained in it, aided by those appearing in the record, are sufficient to warrant a removal, and consider the question only whether it was filed in time; for it cannot be controverted that the action has now assumed the aspect of a controversy between citizens of different states, and should have been removed upon timely application for that purpose. In determining this question, the contents of the petition must be considered in connection with the proceedings in the case prior to its presentation. We must presume that the trial was taken up in due course, upon the day theretofore appointed, and upon the announcement of both parties that they were ready for trial. The announcement by the plaintiff that he was ready for trial, defendant McCarthy not being then subject to the jurisdiction of the court so as to be put upon his defense, a fact known to counsel for the railway company, amounted to notice by the plaintiff that he had determined to proceed against the railway company alone. This was equivalent to a complete severance of the action as to the railway company, and, so far as it is concerned, converted it into a separate action against this defendant as effectively as if it had originally been made the sole defendant. (*Berry v. St. Louis & S. F.*

R. R. Co. (C. C.), 118 Fed. 911; *Yarde v. Baltimore & O. R. Co.* (C. C.), 57 Fed. 913; *Northern Pacific R. R. Co. v. Austin*, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. Ed. 218; *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Kansas City, Ft. Scott & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963.) Thus the action became at once removable on the ground of diverse citizenship without regard to the question whether the joinder was originally made in bad faith for the purpose of preventing removal. This was declared to be the rule in *Berry v. St. Louis & S. F. R. R. Co.*, *supra*, which was an action by plaintiff for damages for the death of her husband against two railway companies, one of which was a resident of the same state with the plaintiff, but had never been served with summons. The plaintiff had the cause set down for trial upon issues joined by the nonresident defendant, and refused to say whether she intended to dismiss or discontinue the cause as to the other defendant. The cause having been removed to the circuit court, a motion was made to remand it to the state court. In disposing of the motion, after pointing out that under the state statute the action was one that could be made joint or several, at the option of plaintiff, the court said: "In the case in hand the plaintiff abandoned her right to a joint judgment by demanding a trial as to one defendant in the absence of service upon the other. The course of trial and the character of the verdict and judgment in a joint action render any other conclusion impossible." So in this state the statute authorizes the rendition of a judgment against one or more of several defendants, leaving the action to proceed against the others, whenever a several judgment is proper. (Revised Codes, sec. 6712.) It cannot be questioned but that the plaintiff in cases of tort like the one at bar has the option to proceed against any one or all of the defendants by whose concurrent action the wrong was done. (Cooley on Torts, 3d ed., pp. 244, 252.) The same principle was recognized and applied in the other cases cited.

It is pointed out by the court in *Powers v. Chesapeake & O. Ry. Co.*, *supra*, that an action which is not removable because it is not a separate controversy wholly between citizens of different states, becomes removable whenever by voluntary action on the part of the plaintiff during the course of the proceedings it is discontinued as to the resident defendant or defendants, even though the litigation has so far proceeded that issues have been joined by the moving defendant. The court, speaking through Mr. Justice Gray, said: "The reasonable construction of the Act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought. The result is that, when the plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as by the express terms of the statute the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time."

Section 3 of the federal statute (U. S. Comp. Stats., 1901, p. 510) declares: "That whenever any party entitled to remove any suit mentioned in the next preceding section * * * may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court, at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal," etc. As construed in the case of *Powers v. Chesapeake & O. Ry. Co.*, *supra*, it permits the removal at any time during the progress of the cause at which it becomes removable; yet its express lan-

guage "at the time or any time before the defendant is required * * * to answer or plead," etc., implies conclusively that a failure to apply promptly upon the first opportunity amounts to a waiver of the privilege, and that it cannot thereafter be claimed.

It is suggested in *Northern Pacific R. R. Co. v. Austin*, *supra*, that, if the conduct of the plaintiff in any given case amounts to a mere device to prevent removal, he may be estopped thereby to allege that the application comes too late; nevertheless, clearly the estoppel cannot be effective if the application for removal be deferred beyond the point of time, during the proceedings, at which it should be made. "Nothing is better settled than that, to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was especially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed." (*Northern Pacific R. R. Co. v. Austin*, *supra*; see, also, *Removal Cases*, 100 U. S. 457, 475, 25 L. Ed. 593.)

Many cases are cited by counsel for the defendant which declare that a state court loses jurisdiction when a petition sufficient on its face has been filed in time; that all questions of fact arising thereon are primarily for the federal courts to decide, since a final decision of them involves a question of federal jurisdiction; that further proceedings in the state court should be deferred until such final decision may be had; and that notwithstanding the state court has refused to surrender jurisdiction, upon filing a copy of the record in the circuit court, that court may use the summary process of injunction to stay proceedings. None of these cases contains anything in conflict with the familiar rule that every court has the power to determine the question of its jurisdiction; such determination being subject to review by the courts which have jurisdiction for that purpose. The supreme court of the United States expressly recognizes and gives effect to this rule in this class of cases. (*Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150; *Baltimore & Ohio R.*

R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.) If the determination is erroneous, all subsequent proceedings, including the final judgment, are void; otherwise, the result is valid and binding. (*Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 54 L. Ed. —.) But, notwithstanding the state court loses jurisdiction, the defendant may nevertheless, without peril to his rights, reserve his exception, and thereafter make all proper defense to the action. Upon final decision by the state court of last resort, if it be adverse to him, he may upon writ of error have the decision reviewed and overruled by the federal court of last resort, and the error thus corrected. (*Chesapeake & O. R. Co. v. McCabe*, *supra*.)

We are of the opinion that the district court properly disregarded the petition for removal on the ground that it was not filed in time. The application should have been made at the opening of the trial.

During the argument we were informed by counsel that since the termination of the trial in the district court a copy of the record in the case had been filed in the federal court, and that that court had assumed jurisdiction of the case by overruling a motion by plaintiff to remand it to the district court. In a supplemental brief the contention is made that this court should take judicial notice of this fact and reverse the judgment, or refrain from action upon the appeal until a final decision by the federal court. This contention cannot be sustained. The defendant brought its appeal into this court for determination of its rights upon the record made in the district court prior to the time the federal court assumed jurisdiction. If we should pursue the course suggested by counsel, we would do so upon the assumption that the district court erred in refusing to surrender jurisdiction simply because of the action taken by the federal court; whereas it seems clear that the action of the district court was correct. While we may take judicial notice of the action of that court (Revised Codes, sec. 7888), it does not follow that we

must necessarily conclude that that court properly assumed jurisdiction. Upon this subject we express no opinion further than what is implied by the conclusion stated above. The rule of comity which exists between the courts of two jurisdictions forbids adverse comment. There are two courses open to the defendant, either of which may be made applicable in order to have its rights finally determined by the proper court. It may have the judgment of this court reviewed upon error to the supreme court of the United States, as the defendant did in *Chesapeake & O. R. Co. v. McCabe*, *supra*, or it may, upon a final disposition of the case by this court, invoke the process of injunction to restrain the plaintiff from proceeding further until the federal question is finally determined by the proper tribunal. Either course will give it all the relief to which it is entitled.

2. On the trial the plaintiff proceeded upon the theory that, in order to hold the railway company liable, it was not sufficient for him to show simply that he was violently ejected from the train by a brakeman in the employ of the company, but that he must show, further, that the act of the brakeman was within the scope of his authority. With this supposed requirement in mind, he sought to prove such authority both by parol evidence as to the course of conduct pursued by himself and other brakemen in the employ of the company, and also by the introduction of the printed rules and published bulletins of the company. To all of this evidence the defendant interposed various objections, which were overruled. The contention is now made that there was prejudicial error in these rulings. Counsel for plaintiff contends that these rulings could not have been prejudicial, for the reason that there is a presumption arising out of the relations of a brakeman to the railway company and its trains, and the character of the employment—which are matters of common knowledge,—that he has such authority, and that it was not incumbent upon plaintiff to adduce any evidence on the subject. Hence the evidence was wholly immaterial, and could not have affected the result. If this presumption obtains, and the court would have been justified in so instructing the jury, the conten-

tion of defendant's counsel is without merit, without regard to the form in which the evidence was adduced; for error cannot be predicated upon the admission of evidence to establish a fact which is admitted in the pleadings or which may be presumed to exist. This brings us to the question whether a brakeman on a freight train has authority by virtue of his employment to eject trespassers therefrom. There is a conflict in the decisions on the subject. Some of the courts hold that the fact that the plaintiff was injured by the tortious act of the brakeman while employed by the defendant does not in itself render the defendant liable, but that the wrong must be shown to pertain to his particular duty and to fall within the scope of his authority. *Farber v. Missouri Pac. R. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, is an illustration of this class of cases. The weight of authority and reason, however, is clearly in favor of plaintiff's contention. Mr. Patterson, in his work on Railway Accident Law, after stating that some of the courts hold to the contrary doctrine, says: "The doctrine of most of the cases, however, is that wherever a railway servant is put in charge of any property of the railway, as a station-master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is therefore for that purpose vested with an implied authority to remove trespassers therefrom; and, if he makes a mistake, either by removing a person who is rightfully therein or thereon, or by using unnecessary violence in the removal of a trespasser, the railway company must be held liable for all such injuries as result in the one case from the removal, and in the other case from the unnecessary violence with which that removal is effected." (Section 111.) This author seems to limit application of the rule to cases where the brakeman is in charge of a particular car. Mr. Baldwin, in his work on American Railroad Law, page 254, states the rule more broadly thus: "It is *prima facie* within the implied authority of a brakeman, whether on a passenger or a freight train, to put off any

person who is found upon it without right; and, if he does this at an improper place or in an improper manner, whereby such person is unnecessarily injured, the company is liable, even if the act were wanton and reckless, provided it were not done to accomplish an independent, malicious purpose of his own. But if the known rules of the company exclude any such authority, the implication is rebutted as respects trespassers."

So in *Kansas City F. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, in speaking generally of the authority and duty of servants of railway companies, including brakemen, the court said: "The removal of trespassers from the train was within the implied authority, and became the duty of the servants in charge of the train; and the fact that in so exercising that right or duty they acted negligently or wantonly, and caused the boy to jump off the train while running at a speed unsafe for him to get off, and he was injured, will not exonerate the defendant."

In *Hoffman v. New York Central & H. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, the court, assigning the duties of a brakeman with reference to the protection of the property of the company to the same category as those of the conductor, said: "The implied authority in such case is an inference from the nature of the business, and its actual daily exercise according to common observation and experience." The rule thus stated finds support in the following cases: *Brevig v. Chicago, St. P., M. & O. Ry.*, 64 Minn. 168, 66 N. W. 401; *Dixon v. Northern Pacific Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, 79 Pac. 943, 68 L. R. A. 895; *Hill v. Baltimore & N. Y. Ry. Co.*, 75 App. Div. 325, 78 N. Y. Supp. 134; *Smith v. Louisville & N. Ry. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72; *Bjornquist v. Boston & A. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; *Johnson v. Chicago, St. P. & M. Ry. Co.*, 116 Iowa, 639, 88 N. W. 811; *Illinois Cent. Ry. Co. v. West* (Ky.), 60 S. W. 290; *McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329.

The duties of a brakeman are less extensive than those of a conductor, who has general charge of the train; but it would be going too far to say that the brakeman's duty extends no further than to turn brakes, couple cars, and the like, and that he may stand by, unless expressly authorized and required by the company to protect its property from trespassers, and allow them to commit trespasses without restraint. A brakeman who would do this would not long retain his place after knowledge of his conduct came to his superior officers. On the other hand, if, after ejecting a trespasser, he were charged with an assault upon him, it could not be doubted that the fact that the act charged as unlawful was committed for the purpose of protecting the property of the company, no more force having been used than the circumstances required, would be a complete defense. Under some of the foregoing authorities, the presumption is only *prima facie*, while under others it is conclusive. We are inclined to follow the former. (Revised Codes, secs. 7961, 7962.) For the purposes of this case, however, it is immaterial which rule is applied. The defendant offered no evidence as to the duties of a brakeman. Therefore it cannot complain of the rulings in question.

3. Contention is made that the evidence is insufficient to justify the verdict, in that it fails to show (1) that the person who ejected the plaintiff was the defendant McCarthy; and (2) that McCarthy had authority from the company to eject the plaintiff. The testimony of plaintiff shows that one of the company's freight trains was about to leave the station at Arlee, Montana, going west, it being in the early morning and still dark; that he climbed to the top of one of the cars near the caboose, intending to ride to the next station; that he had money enough to pay his fare; that, after the train began to move, he was accosted by a man who carried a white lantern in one hand and a stick in the other, about three feet long, and was told to get off, with a threat that unless he did so he would be knocked off; that he offered to pay his fare, but this was refused with a repetition of the threat; that he began to climb down the side ladder, remon-

strating against being compelled to get off while the train was in motion, and that, in spite of his remonstrances, he was pursued by the man until he was compelled to swing off the ladder and so fell under the wheels. He referred to this man as the "rear brakeman" and "McCarthy," but did not at first undertake to identify him further than to give a somewhat meager personal description of him. Later during the trial, after seeing McCarthy and hearing him speak, he identified him positively. From the testimony of McCarthy, the conductor, and the head brakeman it appears that McCarthy was the rear brakeman; that it was part of his duty to attend to the brakes toward the rear, dividing the train with the head brakeman, and that, when he got upon the train at the siding, he carried a white lantern and a brakestick about three feet long. These facts, together with the assumption of authority made by him, were sufficient to go to the jury as to the identity of the person who ejected plaintiff. The testimony of all the members of the train crew tended strongly to show that, when the train began to move, McCarthy went into the caboose with the conductor, and remained there until the next station had been reached. McCarthy himself testified that he did not put anyone off the train on that occasion, and that he had never done so on any other occasion whatever. If the statements of these witnesses were to be taken as true, then the person who ejected plaintiff was not one of the employees of the company. The truth of their statements, however, was a question to be resolved by the jury, and with their conclusion we cannot interfere. What has already been said on the subject of the implied authority of the brakeman disposes of the second point made as to the insufficiency of the evidence. The defendant adduced no evidence on this subject. This left the case to go to the jury upon the presumption that it was his duty to eject trespassers from the train.

4. Among others, the court gave the following instruction: "A further section of the law which I have quoted to you declares: 'Section 2. It shall be and is hereby declared to be misde-

meanor for any person except railroad employees in the performance of their duty to take passage or ride upon or enter for the purpose of taking passage or riding upon the trucks, rods, brake-beams, or any part of any car, locomotive, or tender not ordinarily and customarily used or intended for the resting place of a person riding upon or operating the same.' I instruct you that the roof or side ladder of a freight box-car are neither of them places ordinarily or customarily used or intended for the resting place of persons riding thereon, and because thereof plaintiff, when on such portions of said car, if he was thereon, was not only a trespasser, but was at the same time engaged in the commission of an unlawful and criminal act, and of a violation of the foregoing criminal statute, which the defendant was entitled to prevent, in a reasonable manner considering the circumstances, and by lawful means." It was requested by the defendant as given, except that the court added the words "in a reasonable manner considering the circumstances, and by lawful means." It is said that the modification rendered the instruction prejudicially erroneous, in that it left the jury to determine the question of law: What are the lawful means which the employees of the company may resort to to eject trespassers? It is true all questions of law should be resolved by the court, leaving the jury to deal with the facts only, as counsel contend. (*Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583.) Here, however, there is no question as to the means adopted by McCarthy in ejecting the plaintiff, if the jury believed plaintiff's testimony. Nor is there any question that his conduct was unlawful. In other portions of the charge the court assumed this to be so, and counsel for defendant acquiesced in this assumption. It was therefore not within the province of the jury to inquire, nor could they under the charge have understood that they were to inquire, as to the character of the means the statute authorizes to be used generally, or what other means might have been availed of in this particular case. It therefore would seem entirely unreasonable to conclude that the defendant suffered prejudice by the

vague language employed by the court in the portion of the instruction criticised.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Appeal taken to the supreme court of the United States, on November 20, 1909.

BADOVINAC, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO., APPELLANT.

(No. 2,687.)

(Submitted October 8, 1909. Decided October 23, 1909.)

[104 Pac. 543.]

Personal Injuries—Railroads—Passengers—Contributory Negligence—Pleadings—Complaint—Insufficiency.

Complaint—Insufficiency—Objection—Time.

1. The objection that a complaint does not state a cause of action may be raised for the first time on a motion for a directed verdict, or at any time.

Personal Injuries—Railroads—Passengers—Contributory Negligence—Complaint—Insufficiency.

2. Plaintiff's complaint in an action against a railroad company alleged that defendant's train on which he was a passenger, while slackening its speed when approaching his destination, did not stop; that it was dark and he could not tell that the train was running at a great rate of speed; that he was directed by defendant's brakeman to jump, and did so, receiving the injuries complained of. *Held*, under *Kennon v. Gilmer*, 4 Mont. 433, that since the proximate cause of his injury was plaintiff's own act, to-wit, jumping off while the train was in motion, it was incumbent upon him to further allege facts sufficient to show that, in so doing, he was not guilty of contributory negligence, i. e., that he acted as a reasonably prudent person would have acted under like circumstances; having failed to so plead, his complaint did not state a cause of action.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by J. D. Badovinac against the Northern Pacific Railway Company for personal injuries. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed and remanded.

For Appellant there was a brief by *Mr. Wm. Wallace, Jr., Mr. John G. Brown* and *Mr. E. F. Gaines*. Oral argument by *Mr. Brown*.

Plaintiff's act in jumping from a moving train in the dark when he knew it was not at the depot, and when he did not expect the train to stop, constitutes negligence. (*Victor v. Pennsylvania Ry. Co.*, 164 Pa. 195, 30 Atl. 381; *Brown v. New York etc. Ry. Co.*, 181 Mass. 365, 63 N. E. 941; *Jacob v. Flint etc. Ry. Co.*, 105 Mich. 450, 63 N. W. 502; *Newlin v. Iowa Cent. Ry. Co.*, 127 Iowa, 654, 103 N. W. 999; *Burgin v. Richmond Ry. Co.*, 115 N. C. 673, 20 S. E. 473; *Mearns v. Central Ry. Co.*, 163 N. Y. 108, 57 N. E. 292; *Brown v. Chicago Ry. Co.*, 80 Wis. 162, 49 N. W. 807; *Pittsburg Ry. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *McDonald v. Boston Ry. Co.*, 87 Me. 466, 32 Atl. 1010; *Mearns v. Central Ry. Co.*, 139 Fed. 543; *Richmond Railway Co. v. Pickleseimer*, 85 Va. 798, 10 S. E. 44; *Paterson v. Central Ry. Co.*, 85 Ga. 653, 11 S. E. 872; *Alabama etc. Ry. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Worthington v. Central Vt. Ry. Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; *Walker v. Vicksburg Ry. Co.*, 41 La. Ann. 795, 17 Am. St. Rep. 417, 6 South. 916, 7 L. R. A. 111; *Illinois etc. Ry. Co. v. Able*, 59 Ill. 131.)

Irrespective of what a trainman may have told him or ordered him to do, it was his duty to act as a reasonable man, or allege sufficient legal excuse for not doing so. (*Hutchinson on Carriers*, sec. 1180, note 10; *Elliott on Railways*, sec. 1628, notes 21, 27, 44; *Whitlock v. Comer*, 57 Fed. 565; *Jones v. Railway Co.*, 95 U. S. 439, 24 L. Ed. 506; *Bosworth v. Walker*, 83 Fed. 58, 27 C. C. A. 402; *Peak's Admr. v. Louisville Ry. Co.*, 23 Ky. Law Rep. 2157, 66 S. W. 995; *Durham v. Louisville Ry. Co.*, 16 Ky. Law Rep. 757, 29 S. W. 737.) The only excuse offered by the

plaintiff is that the brakeman ordered him to jump. The proof however, at most, only shows advice by the brakeman, and mere advice is not sufficient to act upon. (*Pittsburg etc. Ry. Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39; *Vimont v. Chicago etc. Ry. Co.*, 71 Iowa, 58, 32 N. W. 100; *Lindsey v. Chicago etc. Ry. Co.*, 64 Iowa, 407, 20 N. E. 737; *McDonald v. Boston Ry. Co.*, 87 Me. 466, 32 Atl. 1010; *Rothstein v. Ry. Co.*, 171 Pa. 620, 33 Atl. 379.) But granting that the brakeman ordered him to jump, we do not think the evidence sufficient to take the case to the jury. The evidence clearly brings him within the rule announced by Hutchinson on Carriers, section 180, that not only obvious dangers, but circumstances rendering it perilous, make out a case of contributory negligence. (*Dunning v. Lake Erie Ry.*, 38 Ind. App. 91, 77 N. E. 1049; *Durham v. Railway*, 16 Ky. Law Rep. 757, 29 S. W. 737; *Pennsylvania Ry. v. Hixon*, 10 Ind. App. 520, 38 N. E. 56; *Illinois Cent. Ry. v. Hanbery* (Ky.), 66 S. W. 417; *Railroad Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323; *St. Louis Ry. Co. v. Highnote*, 99 Tex. 23, 86 S. W. 923; *Peak's Admr. v. Louisville Ry.*, 23 Ky. Law Rep. 2157, 66 S. W. 995; *Lake etc. Ry. v. Bangs*, 47 Mich. 470, 11 N. W. 276; *Walker v. Railway Co.*, 41 La. Ann. 795, 17 Am. St. Rep. 417, 6 South. 916, 7 L. R. A. 111; *Schultze v. Railway Co.*, 32 Mo. App. 438.)

Brief by *Messrs. Mackel & Meyer*, for Respondent. Oral argument by *Mr. A. Mackel*.

Appellant lays some stress upon the fact that there is no allegation in plaintiff's complaint negating contributory negligence. We contend that this was not necessary, and that the facts which we have set out do not show that plaintiff was guilty of contributory negligence. If the complaint shows contributory negligence on the part of the plaintiff, then the mere allegation that he was acting with due care and was not guilty of negligence would not have availed him anything. If, however, there were any merit in the appellant's contention that such an allegation should have been made, then it has waived this point.

Having consented to the overruling of the demurrer, and then having affirmatively pleaded contributory negligence, and the plaintiff having denied the same, the defendant has, in so far as the question of pleading is concerned, waived this point. (*Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697; *Lockey v. Horsky*, 4 Mont. 457, 2 Pac. 19; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637; *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589.)

Would a reasonably prudent person be justified in dismounting as the plaintiff did? The fact that it was dark, thus preventing plaintiff from more fully judging of the speed or the danger, was a circumstance in plaintiff's favor, because it could be inferred therefrom by the jury that the plaintiff was not as able to see and realize the danger. (*Kentucky & I. Bridge Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448; *Louisville etc. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107; *Baltimore & O. Co. v. Mullen*, 217 Ill. 203, 75 N. E. 474, 2 L. R. A., n. s., 115.)

The general trend of the authorities is to the effect that the question of contributory negligence in alighting from a moving train is a question of fact for the jury. And certainly is this so where he is advised, urged or commanded to do so by the trainmen. (See *Galloway v. Chicago R. & P. R. R. Co.*, 87 Iowa, 458, 54 N. W. 447; *Covington v. Railway Co.*, 81 Ga. 273, 6 S. E. 593; *Cincinnati etc. v. Carper*, 112 Ind. 26, 2 Am. St. Rep. 144, 13 N. E. 122, 14 N. E. 352; *Cartwright v. Chicago etc. R. Co.*, 52 Mich. 606, 50 Am. Rep. 274, 18 N. W. 381; *Gulf etc. Ry. Co. v. Brown*, 4 Tex. Civ. 435, 23 S. W. 618; 6 Cyc. 638, 639; 3 Thompson on Negligence, secs. 2850, 2879, 2880; 4 Elliott on Railroads, sec. 1628.) Where the plaintiff alights from a moving train upon the advice, suggestion or command of the carrier's servant, it generally always is a question for the jury to determine whether he was guilty of contributory negligence. (*Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *Chicago & A. R. Co. v. Gore*, 202 Ill. 188, 95 Am. St. Rep. 224, 66 N. E. 1063; *Baltimore & O. R. Co. v. Leapley*, 65 Md. 571, 4 Atl. 891; *Delaware & H. Co. v. Webster* (Pa.), 6 Atl. 841; see,

also, *Carr v. Eell River & E. Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; *Brashear v. Houston etc. Co.*, 47 La. Ann. 735, 49 Am. St. Rep. 382, 17 South. 260, 28 L. R. A. 811; *Strand v. C. N. W. Co.*, 64 Mich. 216, 31 N. W. 184; *Raben v. Central Iowa Ry. Co.*, 74 Iowa, 732, 34 N. W. 621.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff recovered judgment, and the defendant has appealed from the judgment and from an order denying it a new trial.

The complaint alleges that plaintiff became a passenger upon defendant's train No. 6, bound from Butte to Chestnut; that as the train approached Chestnut a brakeman on the train called the station; that the train slackened its speed, but did not stop; that plaintiff went out upon the platform, and was directed by the brakeman to jump from the moving train; that it was dark and plaintiff could not tell that the train was running at a great rate of speed, and because he could not tell that the train was running at a great rate of speed, and because he relied upon the direction of the brakeman, he jumped from the moving train, and received the injuries of which he complains. The complaint also alleges that in fact the train was running at a much greater rate of speed than plaintiff had supposed at the time he jumped. The defendant entered a general denial, and also pleaded contributory negligence. Before answering, the defendant interposed a general demurrer, but by consent this was overruled, and we may now treat the case as though a demurrer had not been interposed at all.

The principal contention made by appellant is that the complaint does not state facts sufficient to constitute a cause of action. Respondent urges that such objection cannot be made for the first time upon a motion for a directed verdict. But there is not any merit in this position; for the objection that the complaint does not state a cause of action may be raised at any time, even in this court for the first time. (*Thornton*

v. *Kaufman*, 35 Mont. 181, 88 Pac. 796; *Wyman v. Jensen*, 26 Mont. 227, 67 Pac. 114.)

In this state it is a general rule that the plea of contributory negligence is an affirmative defense, and the burden of making it is upon the defendant. (*Nord v. Boston & Mont. Con. C. & S. Min. Co.*, 33 Mont. 464, 84 Pac. 1116.) But to this well-established rule there is one exception, which is as well recognized as the rule itself. In *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871, this court said: "If, however, the complaint shows the proximate, or a proximate, cause of the injury to have been the act of the plaintiff, the complaint must also state his freedom from negligence in the doing of the act; otherwise the pleading is bad." And in *Orient Ins. Co. v. Northern Pacific Ry. Co.*, 31 Mont. 502, 78 Pac. 1036, we also said: "The existence of contributory negligence need not be negatived in the complaint unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff." This rule of pleading was first announced by this court in *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21. In that case Kennon was a passenger upon a stage-coach owned and operated by Gilmer and others. The horses attached to the coach became unmanageable and broke the pole of the coach. Kennon, becoming frightened, jumped from the moving vehicle and was injured. He brought an action to recover damages, and in his complaint, after charging negligence on the part of the defendants in failing to furnish suitable horses and a competent driver, alleged that, by reason of the facts already pleaded, the plaintiff was placed in such a position as to imperil his safety, "and to render it apparently unsafe for plaintiff to longer remain on said coach; that he, being actuated by just fear of bodily injury by longer remaining thereon, jumped from said coach, and, in so doing, one of plaintiff's legs was fractured, bruised, broken," etc. Of that complaint this court said: "Thus the plaintiff declares that the proximate cause of the injury he sustained was his own action." Upon considering the excuse offered by Kennon for his act in jumping from

the coach, the court reached the conclusion that the facts stated by way of excuse were not sufficient to show that the plaintiff was not guilty of contributory negligence, and therefore concluded that the complaint did not state a cause of action.

In many respects the facts in the case at bar cannot be distinguished from those in *Kennon v. Gilmer*. Here, as there, the plaintiff alleges that the proximate cause of the injury he sustained was his own act—jumping from a moving vehicle. The facts differ only as to the excuse offered by the plaintiff. In *Kennon v. Gilmer* it was “apparent danger and fear of bodily injury”; in this instance, the plaintiff declares that he jumped from the moving train because (1) it was dark and he could not determine that the train was moving at a great rate of speed; and (2) the brakeman directed him to jump. The word “directed,” as herein used, does not import threats or force. There is not any contention made that the brakeman did more than to tell the plaintiff to jump from the train. It appears from the complaint that the plaintiff knew the train was in motion at the time he jumped; and the fact that it was so dark that he was not able accurately to determine the speed of the train would seem to offer the very best reason why he should not have assumed the risk rather than to excuse him for his act. The fact that the brakeman told him to jump is not any excuse; for, if that fact, standing alone, would justify him in jumping from the train moving at a speed which he could not estimate, it would likewise justify him in jumping from a train moving at a rate of sixty miles per hour. A man much accustomed to boarding and alighting from moving trains might with safety to himself jump from a train running at a rate of ten miles per hour, while one not so accustomed would be almost certain to sustain serious injury in alighting from a train moving at a rate of five miles per hour. In any event, the plaintiff having alleged in his complaint that the proximate cause of his injury was his voluntary act in jumping from the moving train, he thereupon assumed the burden of alleging facts sufficient to show that in so doing he was not guilty of

contributory negligence. (*Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063; *Poor v. Madison River Power Co.*, 38 Mont. 341, 99 Pac. 947; *Ball v. Gussenhoven*, above; *Orient Ins. Co. v. Northern Pacific Ry. Co.*, above; *Kennon v. Gilmer*, above.)

If the reasons assigned in the complaint are the only ones plaintiff has, then we think he fails to meet the requirements of the rule just stated above. Of course, the fact that it was dark might become a factor in plaintiff's favor if he was deceived thereby into believing that the train was moving so slowly that he could with reasonable safety to himself alight from it. The chief difficulty with plaintiff's complaint in this regard is that it is so vague its meaning is not easily discernible. It alleges, first, that the train slackened its speed, but did not stop. That allegation would be fully supported by proof that the train was running at a rate of fifty miles per hour and reduced its speed to forty miles per hour, for the word "slacken" means to lose rapidity; to become more slow. (Webster's International Dictionary.) Again, the complaint alleges that the plaintiff did not know that the train was moving at a great rate of speed. This is pregnant with the admission that he did know that it was running at a considerable rate, or at any rate less than a great rate. He does not allege that he understood the brakeman's direction to him to jump to imply that the train was moving at a very slow rate of speed. It does not appear from the complaint whether the plaintiff was a man much accustomed to traveling on the railroads or experienced in alighting from moving trains, or whether he was encumbered with baggage or other things which prevented the free use of his limbs. In other words, to show by his complaint that he was not guilty of contributory negligence he must allege facts sufficient to show that he acted as a reasonably prudent person under like circumstances would have acted. This rule seems to be founded in reason. The standard of action in all such cases must be that of a reasonably prudent person; and, if it was necessary for plaintiff to prove that in jumping from the moving train he exercised that degree of care and prudence

which a reasonable person would have done under like circumstances, then he must allege the facts in order that an issue may be made, if the defendant should see fit to make the issue. Many authorities might be cited in support of the principles announced; but, since they are established by the decisions of our own court, we have chosen to rely upon them alone. Under a sufficient complaint we think it would have been a question for the jury to determine whether plaintiff was guilty of contributory negligence, and this question would have to be resolved by determining whether he acted as a reasonably prudent person would have done under like circumstances.

The foregoing views seem to be sufficient to dispose of the questions raised upon these appeals. For the reason that the complaint does not state facts sufficient to constitute a cause of action, the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

SUTTON, RESPONDENT, v. LOWRY, EXECUTOR, ET AL., APPELLANTS.

(No. 2,665.)

(Submitted October 6, 1909. Decided October 23, 1909.)

[104 Pac. 545.]

*Oral Contract—Breach—Complaint—Evidence—Insufficiency—
New Trial—Abuse of Discretion—Misconduct of Jurors—
Affidavits—Inadmissibility—Appeal—Record.*

Appeal—New Trial—Record—Sufficiency.

1. Where the record on appeal from a new trial order, made upon the minutes of the court, contains all the papers enumerated in sections 6799 and 7114, Revised Codes, and the certificate of the trial judge recites that the statement of the case is true and correct, it will be held to contain all the minutes.

39	462
39	522
39	462
41	439

Same—Finding Favorable to Appellant—Right to Complain.

2. A finding in favor of defendant on his counterclaim "and against the plaintiff, for the sum of no dollars," was in the latter's favor, of which he will not be heard to complain.

New Trial—Misconduct of Jurors—Affidavits—Information and Belief—Hearsay.

3. Affidavits based upon matters of hearsay or upon information and belief are incompetent to show misconduct of jurors.

Same—Affidavits—Insufficiency.

4. Affidavits reciting that a juror had certain amounts of money immediately after the trial of a cause, a retrial of which was sought on the ground of misconduct of jurors, were insufficient, where affidavits disclaimed any knowledge of the source from which such money was received.

Same—Affidavits—Immateriality.

5. A record of a contempt proceeding against a juror relating to matters which occurred subsequent to, and were not in any manner connected with, the cause of which a new trial was asked because of misconduct of such juror, was immaterial, and therefore properly excluded.

Same—Impeaching Verdict—Affidavits of Jurors—Inadmissibility.

6. The provision of section 6794, subdivision 2, Revised Codes, that the affidavits of jurors may be used to impeach a verdict only when it was reached by resort to chance, is exclusive; hence, an affidavit of a juror, relating to a conversation had with another juror touching the latter's misconduct, was incompetent, as was also that of one, not a juror, as to the contents of an affidavit of the offending juror, for the same and the additional reason that it was hearsay.

Same—Incompetency of Juror—Time to Object.

7. Plaintiff's affidavit in support of a motion for a new trial alleged that one of the jurors sitting in the cause had pursued his vocation as pumpman in a mine every night during the trial, and was therefore not able to give to it that full and deliberate consideration which a litigant is entitled to from a juror. The affidavit did not set forth that neither plaintiff nor his counsel knew of this during the progress of the trial. *Held*, that in the absence of such an averment the affidavit was unavailing, since a party cannot speculate upon the chances of a verdict by refraining from objecting to the incompetency of a juror, known of during the trial, and then, upon an unfavorable outcome, urge the objection on motion for a new trial.

New Trial—Insufficiency of Evidence—Conclusiveness of Verdict.

8. The question of the credibility of witnesses is primarily addressed to the jury, and their verdict, in an action at law, sought to be set aside on the ground that the evidence was insufficient to justify it, should only be set aside for the most cogent reasons.

Contracts—Breach—Contingencies—Complaint.

9. Where plaintiff's right to recover, in an action for the breach of a contract, is contingent upon the happening of a future event, he must allege in his complaint that the contingency has arisen and that he has fully performed on his part.

Same—Breach—Contingencies—Full Performance—Complaint—Insufficiency.

10. Plaintiff brought suit to recover on an oral contract, under the alleged terms of which he was to take charge of the defense in an

action against defendants to recover damages for wrongfully extracting ores from a mining claim adjoining their own, he, in the event of the successful termination of the litigation, to be recompensed by a lease on defendant's mine and in various other ways. The complaint alleged that such litigation was still undetermined, but that he had been prevented from fully performing on his part by the action of defendants in selling their mine and parting with possession thereof. *Held*, that the sale of their property by defendants did not *ipso facto* terminate the litigation, and that, nothing appearing in the complaint that it would not be continued or that plaintiff was released from performing on his part, the pleading did not state a cause of action on the contract.

Same—Insufficiency of Evidence—New Trial—Abuse of Discretion.

11. Where a review of the evidence in an action for the breach of an oral contract disclosed that the verdict of the jury in favor of defendants was the only one which could justly have been reached, the trial court abused its discretion in granting a new trial on the ground that the evidence was insufficient to justify the finding.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Wakeman Sutton against T. M. Lowry, executor of Silas F. King and others. Judgment for defendants; and from an order granting a new trial, they appeal. Reversed.

There was a brief by *Mr. Lewis P. Forestell*, and *Mr. James E. Murray*, in behalf of Appellants, and oral argument by both.

The order of the court granting a new trial was arbitrary and not based upon sound discretion. In view of the plain admissions and contradictions of plaintiff, and the absolute preponderance of the testimony in favor of defendants, there was a manifest abuse of discretion in granting a new trial, and the order should therefore be reversed. (*Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419; *Clifford v. Denver S. P. & R. R. Co.*, 12 Colo. 125, 20 Pac. 335; *Rowe v. Matthews*, 18 Fed. 132; *Cotter v. Butte & Ruby Valley Smelting Co.*, 31 Mont. 129, 77 Pac. 509; *Orr v. Haskell*, 2 Mont. 225; *Sovereign Camp, Woodmen of the World v. Thiebaud*, 65 Kan. 332, 69 Pac. 349.)

The contract alleged in plaintiff's complaint is a contract which, by its terms, cannot be performed within one year, and is therefore within the statute of frauds. (Rev. Codes, sec. 5017.) The lease was not to take effect until the termination

of the litigation, which had just been commenced at the time the alleged contract was made. It is clear that such a contract could not, by its terms, be performed within one year from the making thereof. (*White v. Levy*, 93 Ala. 484, 9 South. 164; *Wickson v. Monarch etc. Co.*, 128 Cal. 156, 79 Am. St. Rep. 36, 60 Pac. 764, 49 L. R. A. 141; *Warner v. Hale*, 65 Ill. 395; *Brownell v. Welsh*, 91 Ill. 523; *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138; *White v. Holland*, 17 Or. 3, 3 Pac. 573; *Jellett v. Rhode*, 43 Minn. 166, 45 N. W. 13; *Wolf v. Dozer*, 22 Kan. 436; *Hand v. Osgood*, 107 Mich. 55, 61 Am. St. Rep. 312, 64 N. W. 867, 30 L. R. A. 379; *Jones on Landlord and Tenant*, sec. 152.)

The contract alleged is based upon a conditional liability, and the rule is well established that where the condition of an agreement is dependent upon a certain contingency, unless it is alleged and proved that the contingency has arisen, no liability attaches in behalf of the party promising performance conditionally. (*Harris v. Root*, 28 Mont. 159, 72 Pac. 429.) The sale of the mine did not render impossible the performance of plaintiff's alleged contract. (*Krebs Hop Co. v. Livesley* (Or.), 92 Pac. 1084.) The right of action did not pass with the sale. (*Evans v. Railway Co.*, 90 Ala. 54, 7 South. 758; *Mayor of Huntville v. Ewing*, 116 Ala. 576, 22 South. 984.)

Affidavits of jurors are incompetent to impeach their verdict. Such affidavits may be received in support of a verdict but not to attack it unless it is arrived at by determination of chance. (*Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803; *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; *Griffiths v. Montadon*, 4 Idaho, 377, 39 Pac. 549; *State v. Rigley*, 7 Idaho, 292, 62 Pac. 679; *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169.) The affidavit of Sutton amounts to nothing, as it is not made positively, but simply states his belief, and for that reason is incompetent and should be disregarded and stricken. (12 Ency. of Pl. & Pr. 1259.) Averments on information and belief are insufficient to show misconduct. (*Bon-*

ardo v. People, 182 Ill. 411, 55 N. E. 519; *Hutchins v. State*, 151 Ind. 667, 52 N. E. 403; *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337; *Texas Farm etc. Co. v. Story* (Tex. Civ. App.), 43 S. W. 933; *Pleasants v. Heard*, 15 Ark. 403; *Youle v. Brown*, 49 Ill. App. 102; *Toliver v. Moody*, 39 Ind. 148; *Shinn v. Tucker*, 37 Ark. 580; *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 543.)

Messrs. McBride & McBride filed a brief on behalf of Respondent, and *Mr. Robert T. McBride* argued the cause orally.

The district court having granted to the plaintiff a new trial, the ruling will not be disturbed by the appellate court in the absence of a satisfactory showing of an abuse of discretion on the part of the lower court. (*Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597; *Stevens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *White v. Barling*, 36 Mont. 413, 93 Pac. 348; *Walsh v. Conrad*, 35 Mont. 68, 88 Pac. 655; *Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455; *Case v. Kremer*, 34 Mont. 142, 85 Pac. 878; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Murray v. Heinze*, 17 Mont. 359, 42 Pac. 1057, 43 Pac. 714; *Haggin v. Saile*, 14 Mont. 79, 35 Pac. 514; *Bowen v. Webb*, 37 Mont. 479, 97 Pac. 839.)

The affidavits submitted going to show the bad character and unfitness of the juror Doney to sit or act as a juror should have been considered by the trial court. A corrupt attempt to influence a verdict of a jury or decision of a court is always a ground for a new trial, without reference to the merits of the case, and whether successful or not. The law is so sensitive upon this subject that affidavits, not explained away, casting suspicion of such misconduct on the prevailing party, will avoid the judgment. (*Scott v. Tubbs*, 43 Colo. 221, 95 Pac. 540, 19 L. R. A., n. s., 733; Thompson on Trials, sec. 2560; *Huston v. Vail*, 51 Ind. 299, cited with approval in *Finlen v. Heinze*, 28 Mont. 576, 73 Pac. 123.) "The rule is applied with almost equal stringency whether such attempts proceed from the pre-

vailing party himself, from his friends, or from officious third persons." (Thompson on Trials, sec. 2560, cited with approval in *Finlen v. Heinze*, above.) Misconduct or irregularity on the part of the jury are questions of fact to be determined by the trial court, and its determination thereon is final and not subject to revision on appeal. (*Hull v. Minneapolis St. Ry. Co.*, 64 Minn. 402, 67 N. W. 218; *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185.) It is an established and salutary rule of law that the least intermeddling with jurors is sufficient cause for setting aside a verdict. Too much care and precaution cannot be used in preserving the purity of jury trials. (*Austin v. Langlois*, 81 Vt. 223, 69 Atl. 741; see, also, *Merritt v. Bunting*, 107 Va. 174, 57 S. E. 569.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action to recover damages for the breach of a contract. In 1899 this plaintiff and J. A. Talbot had a lease upon the Silver King quartz lode mining claim, situated in Silver Bow county, and owned by the defendants-Murray, King, and Daly. During the term of such lease J. H. Maloney and others, the owners of the Plymouth claim, which adjoins the Silver King claim, brought an action against Sutton, Talbot, Murray, King and Daly to restrain them from removing the minerals from certain veins claimed to belong to the Plymouth property, and to recover damages for ores already removed from the disputed territory. The complaint in this action, after setting forth these facts at greater length, then alleges that upon the commencement of the Plymouth-Silver King litigation, Murray, King, and Daly employed the plaintiff, Sutton, to prepare the defense in said action, by doing such development work as might be necessary, and by procuring witnesses to testify to the facts shown by such development work, and generally to take charge of the defense in said action and the preparation of that case, and any other cases which might arise in connection with the same subject matter, for Murray, King and Daly,

and that in consideration of his doing so, Murray, King, and Daly agreed that in the event of their success in the Plymouth-Silver King litigation, they would recompense Sutton by (1) repaying him whatever money he necessarily expended; (2) paying him well for his time; and (3) giving him a new lease upon the Silver King property upon the same terms as those contained in the lease to Sutton and Talbot, such lease to be given "as soon as the said litigation was ended." The complaint further alleges that between August 1, 1897, and July 1, 1906, plaintiff, in pursuance of such contract, expended the sum of \$10,250, and that his time, expended pursuant to said agreement, was worth \$35,000, and that no part of either of these sums had been paid to him. It is further alleged that the Plymouth-Silver King litigation is still pending; that prior to the commencement of this present action Murray, King, and Daly sold the Silver King property and parted with possession of it, and by such acts have made it impossible for them to carry out that part of the agreement to give to this plaintiff the lease mentioned above. It is then alleged: "(13) That a lease on the said ground for the period of one year, upon the terms which the said defendants agreed to give the same, would be of the reasonable value of \$50,000." The prayer is for judgment for \$95,250 and costs.

The answers consisted of general denials and other matters by way of defense. The defendant King set forth certain counterclaims for money loaned by him to plaintiff, and all but one of these counterclaims, so far as they relate to money loaned, are admitted in the reply. Upon the trial the jury returned the following verdict: "We, the jury in the above-entitled cause, find our verdict herein in favor of the defendants and against the plaintiff, upon the cause of action set forth in plaintiff's complaint; and we further find in favor of Silas F. King, upon the counterclaim set forth in his separate answer, and against the said plaintiff, for the sum of no dollars." Upon this verdict a judgment was rendered and entered in favor of defendants Murray, King, and Daly for their costs. The plaintiff

made a motion for a new trial, and in his notice of intentions specified most of the statutory grounds, and gave notice that he would ask for a new trial upon the minutes of the court and affidavits thereafter to be presented. The plaintiff presented affidavits in support of his contention that he had been prevented from having a fair trial by reason of the misconduct of certain jurors; but, upon objection by defendants, these affidavits were disregarded. The court, however, in a general order granted plaintiff's motion for a new trial, and from that order the defendants have appealed. Some time after the trial of the cause the defendant King died, and Lowry, his administrator, was substituted in his stead.

At the outset we are met with a question of practice urged by respondent as follows: "The motion for a new trial was made upon the minutes of the court. The record does not contain the minutes of the court, nor does it contain anything which purports to be a complete record, including the minutes of the court, and the appeal for that reason should be dismissed"—and *Sanden v. Northern Pacific Ry. Co.*, ante, p. 209, 102 Pac. 145, is cited in support of this contention. In the *Sanden Case* the motion for new trial was made upon the minutes of the court and a bill of exceptions. In the record on appeal the minutes of the court were not presented, and we therefore held that, in the absence of such minutes, we could not say that the order granting the new trial was not properly made. But the same condition does not prevail in this present appeal. This record contains the judgment-roll, a statement of the case, and copies of the affidavits used, of the notice of intention to move for a new trial, plaintiff's bill of exceptions, the order appealed from, and the notice of appeal. Sections 6799 and 7114, Revised Codes, provide that upon an appeal from an order granting a new trial, wherein the motion is made upon the minutes of the court, the record on appeal shall consist of the papers just enumerated above, as contained in this record. The trial court, in settling this statement of the case, certifies that it is true and correct; and since the only office of a state-

ment of the case is the bringing before this court the minutes of the trial court, it follows that a true and correct statement contains all the minutes.

It is also suggested by respondent that the verdict is inconsistent with the admitted facts, and this is true. The pleadings admit an indebtedness on the part of plaintiff to defendant King, and yet the verdict does not find in King's favor for any amount. But this is not a matter of which respondent Sutton can complain. If the finding of the jury that King is not entitled to recover on his counterclaims amounts to anything, it is a finding in Sutton's favor, of which he cannot complain, and which he could not urge in the trial court in support of his motion for a new trial.

It was also urged by respondent that the trial court ought to have considered the affidavits presented in support of his motion for new trial, and ought to have granted a new trial upon the ground of misconduct of the jury, or, speaking more accurately, misconduct of jurors Doney and Ronning. The affidavit of plaintiff, Sutton, sets forth only matters of hearsay or matters on information and belief, and was incompetent for the purpose offered. (*People v. Findley*, 132 Cal. 301, 64 Pac. 472; *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540.)

The affidavits of Fred Henderson and Dr. Witherspoon recite the fact that the juror Doney had certain amounts of money immediately succeeding the trial of this case, but each affiant disclaims any knowledge of the source from which such money was received. The record of certain contempt proceedings against Juror Doney was wholly immaterial. It relates to a matter which happened subsequent to, and not in any manner connected with, the trial of this case.

One of the affidavits presented is by Henry Olsen, a juror who sat in the trial of this case. It relates to a conversation had with the juror Doney, and tends to show misconduct on the part of Doney in deciding this case. Our Code provides, in subdivision 2 of section 6794, that the affidavits of jurors may be used to impeach a verdict when the verdict was reached by

resort to chance. This is the only instance wherein it is permitted to impeach a verdict by the affidavit of a juror; and it is quite uniformly held that such a statutory provision is exclusive. In *State v. Beesskove*, 34 Mont. 41, 85 Pac. 376, this court announced the general rule as follows: "While there is some contrariety in the decisions of courts upon the question whether jurors should be heard to impeach their own verdict, we think reason and great weight of authority condemn the practice which permits it. (See 29 Am. & Eng. Ency. of Law, 1008, 1009, with notes.) In any event, it should not be tolerated further than the statute permits. (Pen. Code 1895, sec. 2192.) This section provides for the one exception, namely, cases where the verdict has been decided by lot, or by any means other than a fair expression on the part of all the jurors. In such case the impeaching affidavit may be made by members of the jury. (Code Civ. Proc. 1895, sec. 1171.) This express exception, under the rule '*Expressio unius est exclusio alterius*,' it would seem excludes all other exceptions. Early in the history of the state the supreme court of California declared it to be the rule, founded on necessary policy, that such affidavits cannot be admitted to impeach a verdict. (*People v. Baker*, 1 Cal. 404.) This rule was adhered to until 1862, when the legislature provided for the single exception of the case where the verdict was found by a resort to chance. With this modification the rule now prevails. (*People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Soap*, 127 Cal. 408, 59 Pac. 771.) The sections of our statute cited were adopted from that state; and, since the interpretations given to them embodies the better rule, we approve and adopt it. Beyond this the court ought not to receive such evidence for the obvious reason that, after the verdict has been rendered, members of the jury would be subject to all sorts of influences intended to induce them to repent of their decision and lend their aid in having it revoked. They might even be tampered with and corrupted, so that the integrity of the verdict must rest, not upon the integrity and honesty of the jury during their deliberations, but upon their sus-

ceptibility to such influences after their duties have been faithfully performed under their oaths." (See, also, *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; *People v. Findley*, above.) For the same reason the affidavits of C. Q. Bates were properly disregarded. If juror Doney's affidavit of his misconduct was incompetent,—as it would have been under the rule announced above,—for the stronger reason would the affidavit of another as to the contents of Doney's affidavit or statement be incompetent; for, in addition to the ground announced, it would be open to the objection that it is hearsay.

The affidavit of the plaintiff also alleges that one of the jurors, Charles Ronning, who sat in the trial of this case, and who, upon the jury being polled, announced that he concurred in the verdict returned, was a pumpman employed in one of the mines in Butte; that the juror continued his work at the mine every night during the progress of the trial of this case, and by reason of this fact was "not in a position or condition to give to the trial of the case the full and deliberate consideration to which a litigant is entitled from a jurymen." But the affidavit does not anywhere state when plaintiff or his attorneys first became aware of this irregularity or misconduct of the jurymen, if his conduct may be given either designation. If, as a matter of fact, the plaintiff or his attorneys knew of the conduct of this jurymen during the progress of the trial, plaintiff cannot now complain, for a litigant may not, with such knowledge, proceed with the trial under the hope or expectation that the offending jurymen may be favorable to his cause, and then complain if he is not. A party is not permitted to thus speculate upon the chances of a verdict. In 1 Spelling on New Trial and Appellate Procedure, section 149, the rule is thus announced: "The general rule, often stated, that a remedy for any act or episode endangering the fairness of a trial must be sought and applied at the earliest practical moment by the party complaining, or having a right to complain, is applicable to all kinds and grades of misconduct of the jury.

Stated more specifically, the rule is that, though the jurors during the progress of the trial are guilty of such misconduct as would have required the court, on motion, to admonish them, or otherwise apply a remedy to remove the effect, or if no such remedy be adequate, to discharge them, yet if he, with knowledge, fail to make any objection or call the court's attention to the alleged misconduct, and allows the trial to proceed to a verdict, he cannot subsequently take advantage of such misconduct on motion for a new trial." And the authorities supporting the text are collected at great length. In the absence of a showing that the plaintiff and his attorneys did not know of such conduct on the part of juror Ronning during the progress of the trial, the affidavit is unavailing for the purpose of showing misconduct or irregularity on the part of the juror.

For the reasons stated, the trial court properly disregarded these affidavits on the hearing of the motion for new trial.

We are not able to discover any other possible ground of the motion upon which the court could have granted a new trial, except insufficiency of the evidence to justify the verdict. The burden of proof was upon the plaintiff, and the verdict returned was in favor of the defendants. The entire controversy hung upon a solution of the question, Was the contract upon which plaintiff relies ever in fact made? The verdict answered this inquiry in the negative. The plaintiff claims that he made the agreement with Murray, and that King was aware of and acquiesced in it. Murray and King each testified positively that such a contract was not made or acquiesced in by him, and numerous facts and circumstances introduced seem strongly to support their contention. The jury believed their testimony, and the question of their credibility was addressed primarily to the jury. So long as the jury is a part of our judicial system, the verdict in an action at law ought not to be set aside, except for the most cogent reasons; otherwise the constitutional guaranty of a right to trial by jury becomes a mere idle phrase—high-sounding, but without any potency whatever.

But aside from the question whether the evidence offered by the defendants was of itself sufficient to sustain the verdict in their favor, we are confronted with the inquiry, Does this record disclose an abuse of discretion on the part of the trial court in granting a new trial? And this must be resolved by reference to the entire record and proceedings before us. According to the allegations of the complaint, the termination of the Plymouth-Silver King litigation, successful to Murray, King, and Daly, was a condition precedent to the plaintiff's right to recover at all, and the rule of pleading is that where plaintiff's right of recovery is contingent upon the happening of a future event, he must allege that the contingency has arisen. (*Harris v. Root*, 28 Mont. 159, 72 Pac. 429.) The complaint does not allege that the Plymouth-Silver King litigation has terminated but, on the contrary, alleges that such litigation is still in court, undetermined at the time this action was commenced. It is also a general rule that plaintiff in such case must allege full performance on his part. This he does not do; but he seeks to avoid this by alleging facts intended to excuse his failure to fully perform. He sets forth that the defendants sold the Silver King property and delivered possession to the purchaser, "and that by the acts of defendants and otherwise plaintiff has been prevented from making a complete performance of the portion of said contract to be by him performed." Since there are not any other acts mentioned, the word "acts" above must refer to the sale and delivery of possession, and the words "and otherwise" do not appear to refer to anything in particular. So this pleading must be construed as alleging that plaintiff was prevented from fully performing his part of the contract by reason of the sale of the Silver King property and delivery of possession thereof to the purchaser, but this allegation is not sufficient. The sale of the property and the delivery of possession did not, as a matter of law, terminate the Plymouth-Silver King litigation. Neither would those facts, standing alone, relieve the plaintiff from his obligation under the contract. Murray, King, and Daly could not avoid their liability

for ores already wrongfully extracted from the Plymouth ground, if any had been wrongfully extracted, by the mere sale of this property, and putting their purchaser in possession. (*Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084.) And there is not anything in the complaint to indicate that the Plymouth-Silver King litigation would not be continued, or that the sale of the Silver King property would in any wise diminish the efforts required on the part of Sutton under the contract, or interfere in any manner with his performing the acts required of him by the contract to be performed. It is not necessary to consider what, if any, right Sutton might have in an action upon a *quantum meruit*. This is not such an action. In this instance he relies upon the contract, as indeed he had to do in order to state any cause of action for the failure of defendants to give him a lease.

Our conclusion is that the complaint does not state a cause of action *on the contract* for money expended, or for the value of plaintiff's time.

A consideration of the remaining question, relating to the defendants' failure to give the lease, discloses the weakness of plaintiff's entire case upon the evidence. The plaintiff alone testifies to the fact that a contract was made by the defendants and himself, relative to his employment to take charge of the defense in the Plymouth-Silver King litigation and the facts and circumstances surrounding the making of it. While he is very positive that a contract was made, his testimony as to the terms and conditions of the agreement is so vague and indefinite, and, when his cross-examination is considered with his testimony given on direct examination, there appear so many contradictions or irreconcilable statements, that we are of the opinion that a verdict in his favor, based upon his entire testimony, would have to be set aside for insufficiency of the evidence to support it. The verdict returned seems to us to be the only one which could have been reached upon the evidence in the case, eliminating the question of King's right to recover on his counterclaims; and, this being so, the court abused its discretion

in granting a new trial, and the order is reversed. (*Ormund v. Granite Mt. Min. Co.*, 11 Mont. 303, 28 Pac. 289.)

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

AMERICAN MINING CO., LTD., APPELLANT, v. BASIN & BAY STATE MINING CO. ET AL., RESPONDENTS.

(No. 2,680.)

(Submitted October 7, 1909. Decided October 23, 1909.)

[104 Pac. 525.]

Deeds—Reformation—Mistake—Nonsuit—Error—Statute of Limitations—Pleadings—Recordation of Instruments—Notice—Laches—Evidence.

Statute of Limitations—Pleadings.

1. The objection that an action looking to the reformation of a deed was not commenced within the time limited by law could be taken only by answer.

Same—Recordation—Notice.

2. *Held*, that the recording of an instrument sought to be reformed, after the statute of limitations had run, because of a mutual mistake of the parties to it, is not alone sufficient to charge plaintiff with constructive notice of such mistake; but that, in determining the question of notice, either actual or constructive, the recording is to be considered with other facts and circumstances.

Same—Statute of Limitations—Pleadings—Insufficiency.

3. Defendants, in attempting to plead the statute of limitations, set forth a section of the statute which had no application; they further alleged that the deed had been recorded, that more than five years had elapsed since the date of recordation, and that therefore the action was barred. *Held*, that, conceding (but not deciding) that by pleading "the facts showing the defense," to-wit, the recording of the instrument and the lapse of five years thereafter, the requirements of section 6575, Revised Codes, relative to the pleading of the statute, were met, the facts so stated were insufficient, under the rule announced in paragraph 2 above, to justify the district court in holding plaintiff's cause of action barred.

Same—Evidence—Nonsuit—Error.

4. Where the evidence adduced by plaintiff in an action to reform a deed was clear, satisfactory and convincing that the instrument as written did not contain the agreement actually entered into by the

parties, that there was a mutual mistake as to a material fact, and that such mistake did not result from plaintiff's negligence, the court erred in granting a nonsuit.

Equity—Statute of Limitations—Laches.

5. *Obiter*: Defendant in an equity case may avail himself of the laches of plaintiff, notwithstanding the statute of limitations has not expired, or in cases where he has neglected to plead the statute or elected not to do so.

Appeal from District Court, Jefferson County; Lew. L. Callaway, Judge.

ACTION by the American Mining Company, Limited, against the Basin and Bay State Mining Company and others. Judgment for defendants, and plaintiff appeals from it and an order denying it a new trial. Reversed and remanded.

Mr. Massena Bullard filed a brief in behalf of Appellant and argued the cause orally.

In view of the provisions of the Codes (Revised Codes, 5029, 6108 and 7873, subdivision 1), and of the uniform decisions of the courts, it cannot be contended that the court may not correct a mistake where the mistake has been mutual between all the parties. (See *Quivey v. Baker*, 37 Cal. 465.) We need but refer to the familiar doctrine that a deed absolute on its face may be shown by parol testimony to be in fact a mortgage, and this, even though it was made in the form of a deed by the agreement or acquiescence of all parties. (*Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Carlton v. Lewis*, 119 Ind. 181, 21 N. E. 475; *White v. Wilson*, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437; *Morris v. Stern*, 80 Ind. 227; *East v. Pedin*, 108 Ind. 92, 8 N. E. 722.) We cite the court to *Earl v. Van Natta*, *supra*, for an intelligent discussion of the question of laches raised by counsel for the defendants in their brief.

It is absurd to say that the record of a deed containing a mistake becomes a discovery of the mistake to the party affected thereby. If the record of the instrument containing the mistake is a discovery of the mistake, then much more ef-

fectually and logically can it be said that the execution of the instrument itself is a discovery of the same. Such a position would destroy the very purpose of the law. The fact that the mistake became a matter of record could give it no more potency than the fact that the mistake was originally made in the document as written.

There was a brief by *Mr. Charles B. Leonard, Messrs. Wight & Pew, and Messrs. Gunn & Rasch*, in behalf of Respondents; *Mr. Carl Rasch* arguing the cause orally.

By pleading the facts, "showing the defense," as the pleader had the privilege to do under section 6575, Revised Codes, the question whether the action was barred was properly raised and presented. (*Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263; *Phelps v. Elliott*, 35 Fed. 455.) Any right to relief that the appellant may have had is barred by its laches. In this state the statute of limitations applies to all actions, equitable as well as legal. This fact, however, does not prevent a court of equity from refusing relief because of the laches of the complainant. The statute of limitations applicable to this action is a legislative declaration that where the time mentioned in the statute has expired, the complainant has been guilty of laches, and it is compulsory to so hold. (See *Patterson v. Hewitt*, 195 U. S. 319, 25 Sup. Ct. 35, 49 L. Ed. 214; *Badger v. Badger*, 2 Wall. 95, 17 L. Ed. 836; 5 Pomeroy's Equity Jurisprudence, sec. 36; *Brooks v. Hamilton*, 15 Minn. 26; *Johnston v. Dunavan*, 17 Ill. App. 59.) In *Marshall v. Westrope*, 98 Iowa, 324, 67 N. W. 257, where one party sent a contract to another to be signed and returned, it was held that the other's negligence in signing without acquainting himself with its contents was an insuperable objection to affording him relief in equity. To the same effect are *Hawkins v. Hawkins*, 50 Cal. 558; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Belt v. Mehen*, 2 Cal. 159, 56 Am. Dec. 329; *Robertson v. Smith*, 11 Tex. 211, 60 Am. Dec. 234; *Serrell v. Rothstein*, 49 N. J. Eq. 385, 24 Atl. 367; *McCobb v. Richardson*, 24 Me. 82, 41 Am. Dec. 374; *Pearce v. Saggys*, 85 Tenn. 724, 4 S. W.

526; *Hill v. Bush*, 19 Ark. 522; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111; *Robinson v. Glass*, 94 Ind. 211; *Glenn v. Statler*, 42 Iowa, 107.

MR. JUSTICE SMITH delivered the opinion of the court.

The plaintiff in this action seeks the reformation of two deeds, also an accounting for rents, and to have its title to the real estate in controversy quieted. The complaint alleges that on September 25, 1897, the plaintiff and the defendant Basin and Bay State Mining Company each owned an undivided half interest in certain real estate in the town of Basin, in Jefferson county; that at the time the Basin and Bay State Mining Company acquired its interest the land was unimproved, and thereafter, but prior to September 25, 1897, plaintiff at its own expense erected valuable improvements thereon, of which it was the sole owner; that the title of the Basin and Bay State Mining Company stood in the name of Alexander J. and James Glass on the records of Jefferson county; that on September 25, 1897, it was agreed between the parties that the Basin and Bay State Mining Company should become the owner of one-half the improvements, and that transfer thereof should be made by the plaintiff to Alexander J. and James Glass, representing and acting for the company, to the end that the parties should be tenants in common of the land, together with the improvements thereon; that "it was intended by the parties interested that the deeds should convey a half interest undivided in the improvements, and it was not intended that any interest in the real estate should be conveyed, and also that it was not intended that any mineral reservation should be included in the deeds; that by the mutual mistake of all the parties the deeds were so written as to convey a half interest in the real estate as well as in the improvements, and also to make a mineral reservation." It is further alleged that the Basin and Bay State Mining Company collected and accounted for the rents until August, 1899, since which date it has refused to account therefor; also, that plaintiff did

not discover the alleged mistakes in the deeds until October 19, 1905.

The defendants denied all of the plaintiff's allegations with regard to mistakes in the deeds, and denied the allegation of that paragraph of the complaint which set forth that plaintiff did not discover the mistakes until October 19, 1905. Defendants also alleged affirmatively that plaintiff's cause of action is barred by the provisions of section 512 of the Code of Civil Procedure of 1895. Defendants' so-called fourth defense reads as follows: "Allege that, as to the property mentioned in said complaint, the plaintiff herein gave a good and sufficient deed thereto unto Alexander J. Glass and James Glass, which by mesne conveyances has passed to the Basin and Bay State Mining Company; that said deeds were recorded in the office of the county clerk and recorder of Jefferson county, Montana, on the twenty-fourth day of March, 1900, in book 25 of Deeds, at page 72, and book 29 of Deeds, at page 84. Defendants allege that plaintiff is barred from maintaining this action for that the record of said county clerk and recorder are notice to the plaintiff herein, and plaintiff has delayed its application for reformation of said deeds for over five years after such notice thereof."

At the trial James Glass testified in categorical substantiation of the allegations of the complaint, relating to the intention of the parties at the time the transfers were made, and that mistakes were made in the deeds. He was corroborated by R. H. Kleinschmidt, an officer of the plaintiff company, and it was stipulated that if Alexander J. Glass were present as a witness, he would testify to the same effect as had James Glass. Kleinschmidt also testified that the American Mining Company first became aware of the mistakes in the deeds at the time of a certain trial in court on October 19, 1905, and that he personally became aware of the error at the same time. No other officer of the plaintiff testified. At the close of plaintiff's case, the defendants moved for a nonsuit, upon nineteen grounds, the principal of which are substantially: (1) That no equity is stated in the complaint or disclosed by

the evidence; and (2) that the cause of action is barred by laches and the express provisions of the statute. The court granted the motion, and from a judgment subsequently entered in favor of the defendants and an order denying plaintiff a new trial these appeals are prosecuted.

We think the district court erred in granting the motion for a nonsuit. It is not seriously contended that the complaint does not state facts sufficient to constitute a cause of action. The testimony of James Glass is ample to prove that mistakes were made in the deeds, and that they do not express the agreements between the parties. This being so, the plaintiff is entitled to the relief sought, unless its cause of action is barred by the statute, or it has too long delayed seeking the aid of a court of equity. This action was begun on December 11, 1905. The section of the statute relied upon in this court is referred to by the respondents in their brief as paragraph 4 of section 513, Code of Civil Procedure, 1895, which provides that the periods prescribed for the commencement of actions, other than for the recovery of real property, are (among others) "within five years: (4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." It is immaterial whether the period of limitation to be applied is two years or five years, for the reason that more than five years had elapsed from the time the transfers were made until the commencement of the action, and section 513, Code of Civil Procedure, 1895, is not specially pleaded; the defendants relying upon the facts set forth in their fourth defense. The objection that the action was not commenced within the time limited can be taken only by answer. (Revised Codes 1907, sec. 6475; *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.) It is conceded that the section specially pleaded—i. e., section 512, Code of Civil Procedure (Revised Codes 1907, sec. 6445)—has no application. But it is contended that the defendants in their fourth defense have pleaded the "facts showing the defense," and have theretofore brought them-

selves within the provisions of section 6575, Revised Codes of 1907. Conceding this to be true, the only fact upon which they rely is manifestly that the deeds were recorded in the office of the county clerk and recorder of Jefferson county on March 24, 1900, and that more than five years elapsed between that date and the time of the commencement of this action. They contend that the record of the deeds was constructive notice to the plaintiff of the mistakes contained therein. No case exactly in point and involving mistake rather than fraud has been called to our attention; but respondents have referred us to the case of *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51, wherein the supreme court of California held under a statute similar to our own that, as fraud and mistake are placed in the same category in the statute, the rules applicable to the one must govern the other. The rule is thus laid down in 25 Cyc. 1195: "The principle which governs the running of the statute of limitations in cases where equitable relief is sought on the ground of mistake is substantially the same as that applicable in cases of fraud." Many cases may be found in the books wherein the courts have held that in actions brought to set aside conveyances of real property on the ground that the same were made to defraud creditors, the mere fact of recording the fraudulent deed is not of itself sufficient to charge a creditor with constructive notice of the fraudulent transfer of title. (See *Jones v. Danforth*, 71 Neb. 722, 99 N. W. 495; *Chinn v. Curtis* (Ky.), 71 S. W. 923; *McGehee v. Cox* (Ky.), 58 S. W. 532; *Coulson v. Galtsman*, 1 Neb. (Unof.) 502, 96 N. W. 349; *Forsyth v. Easterday*, 63 Neb. 887, 89 N. W. 407.)

We think the better rule to be established in this state is that the recording of the instrument is to be considered with other facts and circumstances in determining whether the plaintiff is to be charged with notice, either actual or constructive, but that the fact of recording alone will not so charge him. In this connection it may be noted that the record of an instrument is not required in order to charge the parties thereto with notice of its contents, but for an entirely different purpose. Having executed

it, they are presumed to know its provisions; and, if the mere record of the instrument is to be construed as notice, then the grantee may always set the statute in motion by filing the instrument in the proper office. That no such rule has generally been recognized by courts of equity is evidenced by the fact that the books contain numerous cases in which courts have reformed recorded instruments years after the statutory time had elapsed, without that question ever having been raised. In the case of *Jones v. Danforth, supra*, the supreme court of Nebraska said this: "There may be circumstances under which the recording of a fraudulent deed to his real estate by a debtor is sufficient to put the creditor upon inquiry, which, if pursued, would lead to a discovery of the fraud, and thereby amount to a discovery of the fraud sufficient to set the statute in motion; but the fact of the recording of the fraudulent deed is not of itself alone sufficient to charge the creditor with notice of the fraud." We conclude, therefore, that there is in this case no pleading on the part of the defendants which in the light of the testimony would warrant a court in holding that the plaintiff's cause of action is barred by the statute of limitations.

Again, it is seriously contended by the defendants that the plaintiff has been guilty of such laches as will induce a court of equity to refuse it relief, even though its cause of action be not barred by the statute. We have no doubt of the correctness of the rule to the effect that the defendant in an equity case may avail himself of the laches of the complainant notwithstanding the time fixed by the statute has not expired (see *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214), and in cases where he has neglected to plead the statute or elected not to do so. (See *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836.) It is undoubtedly true, as was said by the supreme court of Virginia in *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5: "Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable per-

son." In our opinion the evidence in this case is clear, satisfactory, and convincing that the deeds as written did not contain the agreement actually entered into by the parties; that there was a mistake as to a material fact; that the mistake was mutual; and that it did not occur by, or result from, the negligence of the plaintiff. These are prerequisite requirements to relief as laid down by the supreme court of Wyoming in the case of *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A., n. s., 1211, and we think they are fully met by the plaintiff here. In the light of the testimony of Mr. Glass, wherein he explains the whole situation, it cannot be said that there was such negligence on the part of the plaintiff as would preclude it from invoking the aid of a court of equity. That a mistake was made is true, but that fact alone cannot debar the plaintiff; for otherwise the court could assume no jurisdiction in such cases. It sufficiently appears, we think, from the testimony of Mr. Glass that Albert Kleinschmidt and Louis Hillebrecht, the president and secretary, respectively, of the plaintiff corporation, were ignorant of the fact that a mistake was made. It further appears that Messrs. Glass, for the Basin and Bay State Mining Company, accounted to the plaintiff for one-half the rents derived from the property from September 25, 1897, to August, 1899. This tends to prove that up to the latter date both parties were ignorant that a mistake had been made, and that the Messrs. Glass, representing the defendant company, thought during those two years that the contract had been properly executed.

We find in the answer an allegation "that on the fourth day of January, 1906, in an action then pending in the district court of Jefferson county, wherein plaintiff herein, American Mining Company, Limited, was plaintiff and defendants herein, Basin Reduction Company and W. A. Kidney, were defendants, being the same persons and corporations as are parties hereto, and for the same cause of action as that set forth in the complaint herein, judgment was duly given and made upon the merits of said cause, a copy of which judgment is hereto attached, marked 'Exhibit A,' and made a part hereof." The

judgment referred to as Exhibit A shows that the court found that "the plaintiff has failed to prove the allegations of its complaint as to lots 1 and 2, block 3 (together with the buildings and appurtenances thereon erected and situate), in the First addition to the town of Basin," and "the court finds that the plaintiff and defendant Basin Reduction Company's lessor, the Basin and Bay State Mining Company, are the joint and equal owners of lots twenty (20) and twenty-one (21), in block two (2), of the First addition to the town of Basin in said county and state, together with the two dwelling-houses and appurtenances thereon erected and being, and that on or about the fourth day of September, 1902, the defendant herein, Basin Reduction Company, being lessee of the Basin and Bay State Mining Company, without obtaining a written or other lease of the plaintiff's undivided one-half interest in the said property, entered into the exclusive use and occupation of the whole of said property, to-wit, lots twenty (20) and twenty-one (21), together with the two dwelling-houses and appurtenances thereon erected and being, and, after said date and prior to the filing of the supplemental complaint herein, collected as rent from said last described property the sum of seven hundred and twenty dollars (\$720); and that the said defendant Basin Reduction Company expended in making repairs upon said last described property during said time the sum of one hundred and sixty-eight and 6/100 dollars (\$168.06), and also paid the taxes upon said property for the years 1902, 1903, and 1904." And the court concluded as a matter of law: "(1) That the plaintiff is entitled to recover of and from the defendant Basin Reduction Company the sum of \$275.97, less one-half of the taxes upon lots 20 and 21, in block 2 aforesaid; the defendant Basin Reduction Company having paid all the taxes on said lots for the three years aforesaid." At the trial of this action R. H. Kleinschmidt testified: "Q. Has there ever been an accounting made to you since 1899? A. Well, we took judgment for the rents on two of the houses, and that has been paid since 1899. Q. That was the last case you speak of?

A. Yes, sir. Q. Outside of that judgment there has never been any accounting since 1899, has there? A. There have been a number of promises made by Mr. Kidney that he would make an accounting, but he never made it. Q. He never made an accounting then? A. No, sir; except as we compelled him in court here."

It was at the trial of the action referred to in the answer, as we read the record, that R. H. Kleinschmidt first learned that mistakes had been made in the deeds, and, as the plaintiff here was the plaintiff in that case also, it is not a violent presumption that it then learned of the mistakes for the first time as testified to by Mr. Kleinschmidt, and the record seems to so indicate. According to the pleadings and testimony in the case we are considering, it was after the first case had been tried, and before the court had rendered judgment, that this action was commenced. In addition to the foregoing, Mr. Kleinschmidt testified to an intimate knowledge of the affairs of the American Mining Company, Limited. He said that he was its secretary and treasurer, and one of its trustees, at the time of the trial, and had held such official positions since its incorporation in 1890. It appears from the deeds of which reformation is sought that Mr. Hillebrecht was secretary in 1897. So Mr. Kleinschmidt probably meant to testify simply that he had been a trustee since 1890. He appears, therefore, to have been in a position to know whether the plaintiff discovered the mistake in the deed prior to October 19, 1905. We do not know from the record how long after 1897 Mr. Albert Kleinschmidt and Mr. Hillebrecht continued to be officers of the company, or where they were at the time of the trial. In view of the foregoing, however, and the fact that the defendants elected to offer no testimony at the trial, and the further consideration that it is so palpable from the testimony that the mistakes relied upon by the plaintiff were actually made, we feel that the relief prayed for should be granted. This is a case which should be finally determined by this court. (*Stevens v. Trafton*, 36

Mont. 520, 93 Pac. 810.) We are, however, unable to ascertain what sum is due the plaintiff for its share of the rents.

The judgment and order of the district court for Jefferson county are reversed, and the cause is remanded to that court, with directions to ascertain the amount due the plaintiff on account of rents, and, if necessary, to take further testimony on that question alone. After such amount is ascertained, the court is directed to enter a judgment therefor in favor of plaintiff, and also reforming the deeds and quieting its title to the land in controversy, as prayed for.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

COPPER MOUNTAIN MINING & SMELTING CO., APPELLANT, v. BUTTE & CORBIN CON. COPPER & SILVER MINING CO., RESPONDENT.

(No. 2,678.)

(Submitted October 7, 1909. Decided October 23, 1909.)

[104 Pac. 540.]

Mines and Mining—Representation Work—Forfeiture—Contiguous Group of Claims—Evidence—Burden of Proof—Equity—Findings—Review.

Mining Claims—Contiguous Group—Representation Work—Forfeiture.

1. Where the annual work done and improvements made upon one of a group of contiguous quartz lode mining claims have no reference to a general plan for the development of the whole group, nor any reasonable adaptation to that end, the expenditures, no matter how large, cannot be said to have been made in the development of the consolidated claim, so as to prevent forfeiture of those claims in the group upon which no representation work had been performed.

Same—Forfeiture—Pleadings—Burden of Proof.

2. One claiming the forfeiture of a mining claim for alleged non-representation must plead it specially and has the burden of establishing his contention by clear and convincing proof.

39	487
41	97
41	453
41	454
39	487
40	29

Same—Contiguous Group—Representation Work—Burden of Proof.

3. The burden of proving that representation work done upon one of a contiguous group of quartz lode claims was done for the benefit of all, that it was adapted to the development of all, and was intended for that purpose, rests upon him against whom a forfeiture is sought for alleged nonperformance of assessment work upon the other claims in the group.

Equity—Findings—Review.

4. While in an equity case the supreme court may examine the evidence and determine the questions of fact for itself, it cannot overturn the findings of the trial court unless there is a decided preponderance of the evidence against them.

Mining Claims—Contiguous Group—Representation Work—Evidence.

5. Evidence held to justify a finding of the district court that plaintiff mining company had forfeited title to certain of a contiguous group of claims, where it appeared that work performed in driving a tunnel on one claim, alleged to have been done with a view to develop all of them, could not reasonably, in the nature of things, have been intended as a part of a general plan of development for the benefit of all.

Same—Contiguous Group—Representation Work—Good Faith.

6. The question whether improvements made upon one of a contiguous group of claims were intended for the development of all the claims constituting it, must be determined by the work as manifested by the relation it bears to the claims, irrespective of the good faith entertained by the owner when making the improvements.

Appeal from District Court, Jefferson County; Lew. L. Callaway, Judge.

ACTION by the Copper Mountain Mining and Smelting Company against the Butte & Corbin Consolidated Copper and Silver Mining Company. Judgment for defendant, and plaintiff appeals from it and an order denying its motion for a new trial. Affirmed.

Brief and oral argument in behalf of Appellant, by *Mr. Lewis P. Forestell*.

In the brief the following cases are cited: *Mann v. Budlong*, 129 Cal. 577, 62 Pac. 120; *Wright v. Killian*, 132 Cal. 56, 64 Pac. 98; *Gear v. Ford*, 4 Cal. App. 556, 88 Pac. 600; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Hall v. Kearney*, 18 Colo. 505, 33 Pac. 373; *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413; *McGarrity v. Byington*, 12 Cal. 426; *Axiom M. Co. v. White*, 10 S. D. 192, 72 N. W. 462; *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452.

Messrs. Walsh & Nolan filed a brief in behalf of Respondent; *Mr. C. B. Nolan* arguing the cause orally.

The following cases are cited in the brief: *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 626, 26 L. Ed. 875; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Remington v. Baudit*, 6 Mont. 141, 9 Pac. 819; *Strasburger v. Beecher*, 20 Mont. 151, 49 Pac. 740; *Power v. Sla*, 24 Mont. 251, 61 Pac. 468; *Lawson Butte Con. Copper Mine*, 34 Land Dec. 655; *Copper Glance Lode*, 32 Land Dec. 542; Lindley on Mines, sec. 630; Costigan on Mining Law, p. 280.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, claiming to be the owner of certain mining ground in Jefferson county under quartz locations designated as the Mammoth, Rarus, Tucker, Anaconda, and Big Butt quartz mining claims, applied to the United States for patents therefor. The plaintiff, claiming a prior right to a portion of the ground under quartz locations designated as the Florence, Jack Taylor, Elaine, Tyrant, Sailor Boy, Stella, Forest, Black Horse, and Twin Boy, filed its adverse claims in the United States land office, and brought this action to determine the right to the possession of the portion in controversy in pursuance of the requirements of the federal statute. (Comp. Stats. U. S. 1901, sec. 2326, p. 1430.) The pleadings are in the form usually pursued in such actions. One of the defendant's claims—the Tucker—was located on February 14, 1907; the others on March 12, 1907. Of the plaintiff's claims the Stella was located on April 1, 1902, the Florence, Jack Taylor, Elaine, Tyrant, Sailor Boy, and Black Horse were located on October 10, 1903, and the Forest and Twin Boy on October 8 and 23, 1903, respectively.

While some question was made at the trial as to the sufficiency of the declaratory statements filed by the respective parties, by objection to their admission in evidence, notice of these features

of the case is not necessary, since they are not seriously urged upon our attention, the only serious contention arising upon the sufficiency of the evidence to sustain the findings of the trial court upon the defendant's plea of forfeiture by the plaintiff for failure to do the representation work upon its claims during the year 1906. The findings were in favor of the defendant. The cause is before us on plaintiff's appeals from the judgment entered upon the findings, and from an order denying its motion for a new trial.

In addition to the claims enumerated above to which plaintiff alleges title, it owns others which are not in controversy in this cause. The record contains no map or plat of the claims of either of the parties, and it is somewhat difficult to understand and show clearly their relative situation. As near as we have been able to gather a knowledge of it from the statements of witnesses and the briefs of counsel, the situation may be described as follows: The claims of plaintiff here involved are situated on the side of Valparaiso Mountain toward the southwest. On that side is a deep gulch, extending along the base of the mountain from the southeast toward the northwest. Beyond this, toward the southwest, is a low hill or spur, extending back into the mountains toward the west and northwest. Upon this is situated the M. L. claim, several hundred feet distant from the claims in controversy. Other claims of the plaintiff, intervening between this and the claims in controversy, lie in the gulch or extend into it from both sides in such a manner as to constitute them all a contiguous group. The defendant's claims also lie upon the side of Valparaiso Mountain, toward the southwest, and hence the conflict with plaintiff's claims. Prior to the year 1905 the annual representation work necessary to preserve title to plaintiff's claims had been done by sinking a shaft near the bottom of the gulch. So far as the evidence in the record shows, this shaft was so situated that it could have been used as a means of developing all the claims in the group and for the extraction of ores found in any of them. During that year the plaintiff, having concluded that the continuance

of the work at this point would be attended with a greater outlay than the circumstances would justify, determined to transfer its operations to a tunnel which had been started by its predecessors on the M. L. claim on a level about forty-two feet above the mouth of the shaft and the bottom of the gulch, and extending toward the southwest. For that and the following year the representation work was done by extending this tunnel; and so it was continued thereafter, the purpose being, as stated by an officer of the company, to intercept a vein appearing in a shaft which had theretofore been sunk on the M. L. claim from the top of the hill. During the year 1906 the tunnel was extended one hundred and forty-six feet in the same general direction. Up to this depth it is parallel with the apparent strike of the vein exposed in the shaft on the M. L. claim. Continued in this direction it would miss the vein entirely and pass through the hill. Subsequent to the bringing of this action its direction was changed, first to the south and then to the east, with the result that the vein in the M. L. was finally intercepted at a distance of more than five hundred feet from its mouth. If driven in its final direction, it would reach the surface of the hill to the east or northeast on a level forty-two feet or more above the bottom of the gulch. This was the situation of affairs at the time of the trial.

Defendant's evidence, besides showing that the work of development, and incidentally that of representation for the year 1906, had all been done in the tunnel as heretofore stated, and that this was the only work that had been done upon any of the group of claims, tended strongly to show that the tunnel could not, within the range of reasonable possibility, be availed of to develop any of the claims on Valparaiso Mountain. The contention of the plaintiff was, and it undertook to show by its witnesses, that by sinking upon the vein at the point of its interception by the tunnel it could drive a cross-cut or drift under the gulch and thus develop and mine the claims beyond, and that the tunnel had been driven with this end in view. There is no controversy but that the expenditure made in the

tunnel in 1906 was sufficient in amount to represent all the claims in the group. The evidence is silent as to whether the vein intercepted in the tunnel is the discovery vein of the M. L.; and, while there is some evidence tending to show that its strike is in the general direction of some of plaintiff's claims across the gulch, there is none furnishing a substantial basis for the inference that it crosses the gulch in their direction or that tends to identify it with any vein found in any of them. Many witnesses, practical miners and mining engineers, were examined, who expressed opinions in support of the claims of the respective parties, giving their reasons therefor. The statements of these witnesses cannot be reconciled.

It is now well settled that the annual expenditure required by the federal statute to preserve the title to mining claims may be made in work or improvements within the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claims and to facilitate the extraction of ore therefrom. (*Strasburger v. Beccher*, 20 Mont. 143, 49 Pac. 740; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Hall v. Kearny*, 18 Colo. 505, 33 Pac. 373; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; 2 Lindley on Mines, 2d ed., secs. 629, 631.) In *Smelting Co. v. Kemp*, *supra*, it is said: "Labor and improvements within the meaning of the statute are deemed to have been had upon a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development—that is, to facilitate the extraction of the metals it may contain—though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be

absurd to require a shaft to be sunk on each location in a consolidated claim when one shaft would suffice for all the locations." The language used by the court evidently means that, if the work done on one of the claims has no reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group or consolidated claim. This view is borne out by the decision in *Jackson v. Roby, supra*, where the above passage is quoted in support of a statement made in defining the meaning of the statute: "In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim, which has no reference to the development of the others, will answer." If the work is not a part of a general plan having in view the development of the group or consolidated claim, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then no matter what the amount of it is, it cannot be said to have been done in the development of the group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met.

The courts are reluctant to enforce forfeitures. He who claims such a penalty to defeat the title of his adversary must plead it specially, and, besides, must establish it by clear and convincing proof. (*Strasburger v. Beecher, supra.*) Nevertheless, when it appears, as in this case, that the representation work done was not done upon all the claims, but upon one only of the group for the alleged benefit of all, then the burden shifts, and the requirement that the work must be adapted to the development of all the claims and was intended for that purpose must be met. This rule is recognized by all the authorities, so far as they have been called to our attention. (*Hall v. Kearney, supra*; *Copper Glance Lode*, 29 Land Dec. 542; 2 Lindley on Mines, 2d ed., sec. 631.) It is primarily a question within the province of the trial court to determine whether

the proof is sufficiently clear and convincing to satisfy the requirement; and in equity cases, such as this, though this court may examine the evidence and determine the question of fact for itself (Revised Codes, sec. 6253), yet it may not overturn the findings of the trial court unless there is a decided preponderance of the evidence against them. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Watkins v. Watkins*, ante, p. 367, 102 Pac. 860.)

Taking into consideration the position of the M. L. claim, with reference to the others in the group, the fact that the tunnel is across the gulch from the others; that it is on a level above the bottom of the gulch; that it extends away from all of the claims in controversy; that it was intended primarily to intercept the vein in the M. L. claim; that it does not appear that this vein traverses any of the other claims or even crosses the gulch in their direction; that, in order to render the tunnel available to develop any of them, it will be necessary to sink a shaft or winze to a depth below the level of the gulch and drift to the eastward many hundreds of feet; that to carry out this plan it will be necessary to install heavy and expensive machinery at the collar of the proposed shaft or winze, to raise the ores, and waste and water encountered, to the level of the tunnel in order to convey them to the surface, whereas this could all have been accomplished with less expense and much more convenience by the use of the shaft in the gulch—taking into consideration the whole of the environment, we think the trial court was justified in its conclusion that the forfeiture alleged by the defendant was clearly and satisfactorily established. The conclusion seems unavoidable that the purpose in extending the tunnel was primarily to encounter pay ore in the M. L. claim, and that it could not reasonably have been intended as a part of any general plan to develop the claims across the gulch or any of them.

Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court

should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule. (*Mann v. Budlong*, 129 Cal. 577, 62 Pac. 120; *Gear v. Ford*, 4 Cal. App. 556, 88 Pac. 600.) Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CORAM ET AL., APPELLANTS, v. DAVIS ET AL., RESPONDENTS.

(No. 2,692.)

(Submitted October 9, 1909. Decided October 23, 1909.)

[104 Pac. 518.]

Trusts and Trustees—Termination of Trust—Profits—Accounting—Compensation of Trustees—Complaint—Insufficiency—Parties—Equity—Pleadings.

Trusts and Trustees—Profits—Accounting—Fixing Compensation—Complaint—Insufficiency.

1. The heirs of a decedent and certain claimants entered into a trust agreement whereby the trustees appointed were to receive and hold moneys derived from the estate, until final distribution. When the trust had been partly executed, and before final distribution of the estate, one of the parties to the contract brought suit against the trustees asking, among other things, that they be made to account for profits received by them from moneys in their hands, and that their compensation be fixed. The complaint did not state to whom the funds belonged, or whether the trustees had made any profit from their use; neither was there any allegation that demand had been made upon them for such profits, nor that they had not been paid

for their services or were claiming any compensation for them. *Held*, that the complaint was insufficient to give a court of equity jurisdiction for the purposes stated, and that a demurrer thereto was properly sustained.

Same—Termination of Trust—Equity.

2. *Obiter*: Where the objects of a trust agreement have been accomplished, and there is no longer any necessity for the intervention of the trustees, a court of equity will abrogate it, in a proper case, and its decision is of no concern to the trustees.

Same—Termination of Trust—Trustees—Parties—Complaint—Insufficiency.

3. A party invoking the aid of a court of equity must show affirmatively a necessity for its intervention; hence, where plaintiff's complaint, in an action against the trustees seeking the abrogation of the trust agreement under which they were appointed, made no claim that the defendants had not properly fulfilled their trust, or that the agreement could not be terminated by the parties to it without the intervention of the court, or that complete relief could not be afforded plaintiffs without the presence of the trustees as parties, it was insufficient, and did not state a cause of action against the latter.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Joseph S. Coram and others against Andrew J. Davis, Jr., and Charles H. Palmer. From an adverse judgment, plaintiffs appeal. Affirmed.

STATEMENT OF FACTS.

The following statement of facts is taken from the brief of the appellants: The purpose of this action is to terminate a trust to the extent that the appellants are interested in the property affected thereby, and to have an accounting by the trustees of the profits received by them from the trust property. It is also sought to have the compensation of the trustees fixed and determined. The trustees, Andrew J. Davis, Jr., and Charles H. Palmer, separately demurred to the complaint in the case as amended. The demurrers were sustained, and judgment was rendered dismissing the complaint. The appeal is from the judgment.

It appears from the complaint as amended and the contract made a part thereof as "Exhibit A" that what purported to be the last will and testament of Andrew J. Davis, deceased, had been propounded for probate, and that a contest against

such probate had been instituted by Henry A. Root and Sarah Maria Cummings. Elizabeth and Charles H. Ladd, Ellen S. and Joshua G. Cornue and Mary L. Dunbar, although not parties to the contest, were interested therein. By the alleged will all of the property of A. J. Davis, deceased, with the exception of certain small bequests, was devised and bequeathed to John A. Davis. Prior to making the contract John A. Davis had died, leaving surviving him several children, who, with the administrator of his estate, constitute the parties of the first part of the contract above referred to. If A. J. Davis had died intestate, Henry A. Root and the others named as parties of the second part in the said contract would have received $3.5/11$ of the estate, and the heirs of John A. Davis would have received $1/11$ of said estate. While the contest referred to was pending, the said contract was entered into. By this contract it was agreed that, in case said will should be finally probated, the parties of the first part should have $2/11$ of the estate and the parties of the second part should have $3.5/11$ of said estate. It was further agreed that the first and second parties should each receive out of the estate remaining after deducting the $5.5/11$, \$500,000 in cash, and any balance after the payment of such amount should be divided equally between them. There were certain provisions of the contract which were to apply in the event the will should not finally be probated, which it is not necessary to refer to at this time. The second paragraph of the contract reads as follows: "For the purpose of carrying into effect the foregoing provision the said parties of the first part do hereby sell, assign, transfer, and set over unto the said parties of the second part an undivided $3.5/11$ of said estate in kind, and hereby direct that by the decree probating said will, if the same is probated, there shall be distributed immediately to said parties of the second part $2.5/11$ of said estate in kind in such interest to each of said second parties as said second parties may at that time direct. There shall also be distributed by said decree to said first parties $2/11$ of said estate in kind in such interests to each as the said first parties at that

time may direct: Provided, however, that the transfers provided for in this section of the agreement shall not be valid unless said will is probated. The remainder of said estate after the distribution of the 2.5/11 to the said second parties, and the 2/11 to the first parties, shall be distributed by the said decree to Charles H. Palmer and Andrew J. Davis as joint trustees of the parties hereto, to be applied, used or distributed according to the terms and provisions of this contract, and in such distribution to said trustees shall be included 1/11 of said estate in kind, which shall be held by said trustees, and if said will shall finally be probated and the said estate distributed under said will according to the terms of this contract, said trustees are hereby directed to deliver over and transfer unto the said parties of the second part in such interests to each as said second parties at that time direct, the said 1/11 of said estate so distributed to and held by such trustees in the manner above recited."

As recited in the contract, if A. J. Davis had died intestate, the heirs of John A. Davis would have been entitled to 1/11, and Henry A. Root and his associates would have received 3.5/11 of the estate, making in all 4.5/11. Now, it was uncertain at the time of entering into this contract whether or not said will would be finally probated. Upon a dismissal of the contest of Root and Cummings others might come forward and contest, and, after the will should be admitted to probate, applications could be made at any time within one year to have the probate vacated. In view of these considerations, the parties could not make any definite and final contract with reference to more of the estate than 4.5/11, which they were entitled to receive in any event. They therefore made a contract whereby the heirs of John A. Davis would, in the event the will should be defeated, receive 2/11, 1/11 more than they were entitled to under the law, and Root and his associates would receive 2.5/11, 1/11 less than they were entitled to under the law. They further agreed that, in the event the will should be finally probated, Root and his associates should receive 3.5/11 and the heirs of

John A. Davis should receive 2/11, and the remainder should be divided equally. Because of the possibility, and perhaps probability, that the will would be defeated, unless the heirs who were not parties to the contract should be satisfied, the contract provided that all but 4.5/11, which the parties to the contract were entitled to in the event the will should be defeated, should be paid to A. J. Davis and C. H. Palmer as trustees. The provisions of the contract clearly disclose that it was contemplated at the time that the heirs who were not parties to the contract would demand recognition, and it was because of the necessity of recognizing such demands in order to have the will finally probated that all of the estate except 4.5/11 was made a trust fund. The heirs of John A. Davis and Root and his associates had settled their differences, and all were then interested in having the will finally probated. To accomplish their mutual desire they placed that part of the estate which would belong to the others, if it could be established that A. J. Davis died intestate, into a trust fund, with the understanding, expressed in the contract, that whatever remained after satisfying the other heirs and accomplishing the final probate of the will should belong to them as provided in the contract. Andrew J. Davis, Jr., and C. H. Palmer were not only made trustees, but by the twelfth paragraph of the contract Davis was made the general agent of the parties of the first part, and Palmer was made the general agent of the parties of the second part in carrying out the contract. That it was the purpose and intent of the parties to the contract to secure for themselves as much of the estate of A. J. Davis, deceased, as possible, and that they were to work jointly to this end, is evidenced by the fifth, tenth, and thirteenth paragraphs of the contract. To accomplish this purpose and consummate this intent, the trust fund referred to was established, and the trustees were empowered to do all things necessary to carry out the contract. After deducting the 4.5/11, or 450/1100, there remained for the trustees 650/1100. The trustees made assignments and transfers to other heirs and claimants in order to

secure the final probate of the will, so that there was left in the trust fund at the time the will was finally admitted to probate 431/1100. The contract creating the trust, and the assignments and transfers to the other heirs, were made the basis of the order or judgment confirming the probate of the will and establishing the rights and shares of the several parties entitled to participate in the distribution of the estate after the payment of the legacies referred to in the will.

In the complaint it is alleged:

“(23) That all the legacies provided for in said will have been fully paid and satisfied, and the said defendants Andrew J. Davis, Jr., and Charles H. Palmer, as trustees, are entitled to have and receive 431/1100 of the balance of the estate of Andrew J. Davis, deceased, to be distributed.

“(24) That all claims and demands against said trust fund of 431/1100 of said estate have been fully paid and satisfied and discharged, except the said claim of Thomas Jefferson Davis, the amount of which has been set aside and is held and retained by said trustees as aforesaid, and all money and property to which said trustees are entitled upon a further distribution of the estate of Andrew J. Davis, deceased, will be received and held by said trustees to be paid over and distributed by them to the heirs and personal representatives of John A. Davis, deceased, and the plaintiffs herein, according to their respective interests.

“(25) That the plaintiffs Joseph A. Coram and Henry A. Root have purchased and acquired and are now the owners of all the right, title, and interest of Elizabeth S. Ladd and her husband Charles H. Ladd and Mary Louise Dunbar in and to the estate of Andrew J. Davis, deceased.

“(26) That of the remainder of said estate of Andrew J. Davis, deceased, to be distributed to the defendants as trustees, to-wit, 431/1100 thereof, these plaintiffs are entitled to have paid over and distributed to them and are the owners of 265.5/1100, making the total share and interest of these plain-

tiffs in the balance of the estate of Andrew J. Davis, deceased, to be distributed, 515.5/1100.

“(27) That the said defendants herein, as trustees, have no duty whatever to perform with reference to the 431/1100 of the estate of Andrew J. Davis, deceased, hereafter to be distributed to them, except to receive and receipt therefor and to pay the same over to these plaintiffs and the heirs and personal representatives of John A. Davis, deceased, according to their respective interests as hereinbefore set forth.”

In the amendment to the complaint it is alleged: “(5) That all of the expenses incurred in carrying out said contract made a part of the complaint as ‘Exhibit A’ and mentioned in paragraph 13 thereof, with interest thereon, have been repaid to the parties furnishing the funds for such expenses.”

Paragraphs 21 and 22 of the complaint are as follows:

“That the said Thomas Jefferson Davis asserted a claim to the said estate of Andrew J. Davis, deceased, or some interest therein in addition to the legacy devised and bequeathed to him by said will, and the said claim so made was purchased by the parties to the compromise agreement dated the twenty-eighth day of April, 1893, attached hereto as ‘Exhibit A,’ and made a part hereof, and it was agreed and understood by and between all of said parties that the amount of the purchase price of said claim should be paid out of the 431/1100 assigned and transferred to the defendants herein as trustees, but that said payment should not be made until the final distribution of the estate of said Andrew J. Davis, deceased.

“(22) That, of the amount paid and distributed to said trustees pursuant to said order of partial distribution dated the twenty-sixth day of August, 1897, there was reserved and retained by said trustees the sum of \$85,000, and of the amount distributed and paid to said trustees pursuant to the order of partial distribution dated the third day of December, 1901, there was reserved and retained by said trustees the sum of \$7,275, to be used in the payment of the purchase price of the claim of said Thomas Jefferson Davis. That said trustees have

held and had the use of said sum of \$85,000 since the twenty-sixth day of August, 1897, and of said sum of \$7,275 since the month of April, 1903. That the said sums of \$85,000 and \$7,275 constitute the full sum and amount to be paid for the said claim of Thomas Jefferson Davis when a final distribution of said estate of Andrew J. Davis, deceased, shall be made."

The purpose of the action is to have the trust terminated as to the 265.5/1100 to which the plaintiffs are entitled, and to have an accounting by the trustees of the interest and profit received by them on the \$92,275 held for Thomas Jefferson Davis, as alleged in the complaint, and to have the compensation of such trustees fixed and determined.

Regarding this statement of facts the respondents' counsel say in their brief: "The appellants' statement is quite full and so far as facts are concerned is quite correct. Many conclusions and speculations concerning the reasons for entering into the contract, which is the subject of contention, are indulged in. These are quite plausibly stated, and it may be that the facts ultimately will sustain what is claimed. The complaint, however, in itself would not justify these without the explanations offered in the brief. We are not inclined, though, to find fault with the brief or any of its contents. * * * "

Messrs. Gunn & Rasch filed a brief in behalf of Appellants; oral argument by *Mr. M. S. Gunn*.

Messrs. Forbis & Evans, for Respondent Davis, submitted a brief, and *Mr. John F. Forbis* argued the case orally.

Mr. Edward Horsky, appearing in behalf of Respondent Palmer, filed a brief.

MR. JUSTICE SMITH delivered the opinion of the court.

We shall take the appellants' statement, stripped of the argument therein contained, as the basis of our decision. The situation depicted is a novel one, and counsel confess their inability to find in the books any substantial precedent for the same.

Does the complaint state a cause of action against the trustees? After a careful study of the pleadings, we have arrived at the conclusion that it does not, and that the district court was correct in sustaining the demurrers thereto.

It appears that the trust has been partly executed, and that there remains in the hands of the trustees the sum of \$92,275 on account of the claim of Thomas Jefferson Davis. Whether this money belongs to Thomas Jefferson Davis or to the parties to the compromise agreement we are unable from the complaint to determine. At any rate, this amount is not due from the trustees until the final distribution of the estate, and plaintiffs do not claim the same; but they demand that the trustees be required to account to them for interest and profits thereon at this time. In view of the fact that it cannot be ascertained to whom the principal belongs, we think the court would not have been justified in assuming jurisdiction of the case on account of the allegations relating to this matter alone. If the principal belongs to Thomas Jefferson Davis, the interest probably belongs to him also, if any interest is to be charged against the trustees. There is no allegation in the complaint that the trustees have made any profit from the actual use of the money. Neither is there any allegation that prior to the commencement of this action any demand was made of them for either interest or other profits. So far as the complaint shows, the agreement between the parties was silent as to interest or profits. The courts have held that in certain contingencies a trustee is liable for interest, and in certain other cases that he is not. (See 28 Am. & Eng. Ency. of Law, 2d ed., 1080.) Whether or not a demand is necessary before suit brought depends upon the facts of the particular case. (*Kerr v. Laird*, 27 Miss. 544.) Ordinarily, a demand for an accounting is necessary, and the bill must contain an allegation that such demand has been made. (1 Ency. of Pl. & Pr. 98.) Again, there is nothing in the complaint to show that the trustees are claiming any compensation for their services, or to indicate that they have not been fully paid for all the services heretofore performed by them.

Under these circumstances, a court of equity ought not to assume jurisdiction on account of the matter of compensation for the trustees' services alone.

The most serious question is whether the complaint states a cause of action against the trustees on account of the fact that the plaintiffs are entitled to have the agreement creating the trust abrogated, for the reason that its object has been accomplished. Plaintiffs maintain that there is no longer any necessity for the intervention of the trustees. The learned district judge intimated in his order sustaining the demurrers an opinion to the same effect, and counsel for the respondents in their brief say: "Let the parties themselves get together and dispose of the property as they will. This we admit they can do, even without the trustees' consent." If the facts set forth in the complaint are true, we see no reason for longer continuing the trust agreement; and a court of equity will afford relief in proper cases. (See *Russell's Appeal*, 75 Pa. St. 269; *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215; *Matthews v. Thompson*, 186 Mass. 14, 104 Am. St. Rep. 550, 71 N. E. 93, 66 L. R. A. 421; *Eakle v. Ingram*, 152 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566.) But let us remember that the plaintiffs are invoking the aid of a court of equity. In order to do this, they must show affirmatively a necessity for the intervention of the court. (16 Cyc. 227, 265.) They must show that the trustees are necessary or proper parties to the action, and state facts sufficient to compel the latter to answer the complaint.

Let it also be remembered that since the commencement of this action the first parties to the trust agreement have by the plaintiffs been made defendants by leave of court. They may controvert the allegations of the complaint, or allow the matter to go by default, or, perhaps, consent that the agreement be abrogated. If they pursue the latter course, then the trustees have confessedly no complaint to make; and, in view of the circumstances, it seems reasonable to suppose that if the trust agreement is indeed of no further benefit to them, and they have regard to their material welfare, which it is to be presumed

they have, they will consent. At any rate, the trustees have no interest in their decision. They, the trustees, are not accused of misconduct, incompetency, neglect of duty, insolvency, or denial of their trust. In fact, no claim is made that they have not properly fulfilled that trust in every particular. They can have no possible objection to having the agreement set aside, either by consent of the parties or order of the court. (See *Sturgeon v. Stevens*, 186 Pa. St. 350, 40 Atl. 488.) They were appointed by the other parties to this action and can be removed by them; but they ought not to be haled into court and subjected to costs unless they have so conducted themselves, as that a cause of action can be stated against them or complete relief cannot be afforded the plaintiffs without their presence as parties. Neither of these conditions obtains in this case, so far as the allegations of the complaint enlighten us. The action can proceed to final judgment between the parties to the trust agreement, and, whatever the decision may be, need not and cannot concern the trustees.

We conclude, therefore, that, as no facts are alleged in the amended complaint sufficient to constitute a cause of action against the respondents, the judgment of the court below should be, and it is, affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. KEELAND ET AL., APPELLANTS.

(No. 2,688.)

(Submitted October 8, 1909. Decided October 23, 1909.)

[104 Pac. 513.]

*Criminal Law—Grand Larceny—Livestock—Corpus Delicti—
Venue—Evidence—Insufficiency—Confessions—Admissions—
Admissibility—Expert Testimony.*

Grand Larceny—Livestock—Evidence.

1. Section 8645, Revised Codes, declaring the stealing of any of the animals enumerated therein to be grand larceny, *refers* to live animals only; therefore, defendants, charged with stealing certain heifers, the carcasses of which, dressed for beef, were found concealed on the range, could be convicted only upon evidence showing beyond a reasonable doubt that they killed, or took part in killing, the animals.

Same—Corpus Delicti—How Established.

2. The *corpus delicti* in a prosecution for grand larceny, as well as in all other crimes, except in cases of unlawful homicide, in which cases the death of the person alleged to have been killed must be established directly, may be proved by circumstantial evidence.

Same—Venue—Insufficiency.

3. Evidence *held* insufficient to show that the defendants killed the cattle, which were wont to range near the county and state lines and the carcasses of which were found concealed in a coulee, in the county in which the venue was laid. The venue must be proved beyond a reasonable doubt. (MR. JUSTICE SMITH dissenting.)

Same—Confessions—What does not Constitute.

4. Statements made by defendants at the time of their arrest, and not in response to questions put to them by the person arresting, which implied guilt and by means of which they sought by corrupt means to influence the person having them in charge to permit defendants to escape, had none of the attributes of a confession, and hence, to make them admissible in evidence, it was not necessary to first show that they were not induced by fear, or threats, or the hope of leniency.

Same—Expert Testimony—Admissibility.

5. The testimony of persons for many years engaged in the livestock business, that in their opinion the flesh of the cattle found concealed on the range, and with the larceny of which defendants stood charged, was that of animals killed and properly bled, was properly admitted, under section 7887, Revised Codes.

Same—Instructions—Refusal—When not Error.

6. The refusal of requested instructions was not error, where the ones given covered those refused.

*Appeal from District Court, Custer County; C. H. Loud,
Judge.*

HENRY J. KEELAND and Frank Randerhoff were convicted of grand larceny, and appeal from the judgment and from an order denying their motion for a new trial. Reversed and remanded.

For Appellants there was a brief by *Mr. Geo. W. Farr*, and *Mr. C. C. Hurley*, and oral argument by both.

They contended, *inter alia*: The *corpus delicti* in this case is the larceny of the live animals then and there being the property of Charles F. Bean; while the connection of the defendants with the meat might be sufficient proof of the *corpus delicti* of the larceny of the meat itself, if they were charged with stealing that, it cannot be of the live animals. Proof as to the larceny of the meat would not be proof of the larceny of the animals while alive. (*People v. Smith*, 112 Cal. 333, 44 Pac. 663; *Nightingale v. State*, 94 Ga. 395, 21 S. E. 221; *State v. Seagler*, 1 Rich. (S. C.) 30, 42 Am. Dec. 404; *People v. Murphy*, 47 Cal. 103; *State v. Alexander*, 74 N. C. 232; *Hunt v. State*, 55 Ala. 138; *Golden v. State*, 63 Miss. 466; 25 Cyc. 69.) As a part of the criminal act, and as a part of the *corpus delicti*, is the ownership of the animals in question. (*State v. Cardelli*, 19 Nev. 319, 10 Pac. 434.) The simple proof that certain cattle bore certain brands and that a certain man owns that brand is not sufficient proof alone of the ownership in that man of those cattle. At the most, evidence as to the brand is only a means of identification; it is not any sufficient proof of ownership. (*State v. Gordon*, 28 Utah, 15, 76 Pac. 882; *State v. De Wolfe*, 29 Mont. 420, 74 Pac. 1084; *State v. Hanna*, 35 Or. 195, 57 Pac. 629; 8 Encyclopedia of Evidence, 139.)

For Respondent there was a brief by *Mr. Albert J. Galen*, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, and oral argument by *Mr. Murphy*.

Mr. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendants were convicted of the crime of grand larceny, alleged to have been committed by them in Dawson county, by

feloniously stealing, taking, leading, and driving away three heifers, of the value of \$40, the property of Charles F. Bean. The animals are described as branded "7L" on the left ribs and having a "swallow fork" in both ears. These appeals are from the judgment and an order denying their motion for a new trial.

1. It is contended that the evidence is insufficient to justify the verdict, in that there is no proof of the *corpus delicti*,—in other words, it is not shown that the heifers were the property of Charles F. Bean and that the defendants stole them while alive; and, second, that the larceny, if committed, was committed in Dawson county.

The evidence introduced by the state shows the following: Charles F. Bean resides in Dawson county, on East Redwater creek, about sixty miles north of Glendive, and is the owner of cattle which roam on the neighboring range. On October 1, 1908, one Ernest Bottins was out upon the range in that vicinity, hunting cattle. He was accompanied by Sylvanus Bean, a son of Charles F. Bean. After riding for some time Bean left Bottins, intending to return home for a fresh horse. Soon after they parted, Bottins discovered some fresh dressed beef concealed in the brush in a coulee. There were three whole carcasses, with the hides and heads. The carcasses had each been cut across into two pieces, so as to leave the fore and hind quarters together. They were lying upon the hides, which had also been cut across from side to side. Judging by the absence of offal and the appearance of the surroundings, the animals had been killed and dressed at some other place, and the beef afterward concealed in the coulee. As shown by the udders left on the hides, they were all heifers. Upon noticing the earmarks, Bottins went in search of Bean. Having found and informed him of what he had discovered, Bottins went to bring a stock inspector and deputy sheriff named Bartley, who resided near by. Bean went home, got his rifle, rode to where the beef was lying, and, after examining the brand and earmarks and finding them to be those used by his father, concealed himself in the brush and watched to ascertain who, if anyone, came to take the beef

away. While he was there, three hunters, all of whom he knew, passed up the coulee, but apparently did not see the beef or know anything about it until, upon their presently returning, he called their attention to it. They then passed on, leaving him on watch. About an hour and a half later the two defendants drove up along the coulee in a lumber wagon. Upon arriving at a point opposite where the beef was concealed, they stopped, and, after some conversation as to whether it was fly-blown or not, began to load it into the wagon. Thereupon Bean came out of his place of concealment and arrested them. The part of his testimony detailing what was said by defendants after the arrest is the following: "Q. After the time the team was unhitched, or during this time that the team was being unhitched, did Keeland make any statement to you? A. Mr. Keeland made a statement to me relative to the killing of this beef at the time the two defendants were there. Q. You may give that conversation now. A. He said he would not have done it if I had not knocked him down here in town. Q. What further statements, if any, did he make along this same line? A. He offered me \$100 to let him go. * * * He offered me \$100 to try and hush it up and let him go. Q. Now, Mr. Bean, state as near as you can, if you remember Mr. Keeland's exact words. A. He says: 'I will give you \$100 if you will drop this or let him (Keeland) out of it.' I don't just remember his exact words; but it was to that effect as near as I can remember. Q. Did he make you any other proposition at that time? A. Yes, sir. Q. State as near as you can in his words. A. He said he would let me have his place for \$200, which was less than it was worth, and he would quit the country here and would not bother me any more; that he would leave the country if I would let him go. Q. Did he make any statement to you relative to the killing of other cattle of your father's? A. Yes, sir. He said that that was the first of ours that he had killed. * * * Q. Now, tell the jury, as near as you can, Mr. Randerhoff's words. A. Mr. Randerhoff made a statement to me. * * * Q. Now, will you state as near as you can his words?

A. Mr. Keeland was asking me to settle it, and Mr. Randerhoff said: 'You had better settle it with him.' He says: 'Think of his family. If you push this, it would leave them in bad shape,' something to that effect. He said to let Keeland go and take him on. He did not make any statement to me that he was to blame." The witness subsequently stated that he and Keeland had had a difficulty in Glendive a few days before, and that he had knocked Keeland down.

The ranch house of the Beans is about four miles from the point where the beef was concealed; that of Keeland, where Randerhoff was staying and at work for Keeland, is about one mile in the opposite direction, near the coulee below. A public road crosses the coulee about fifty yards above, and another further down near the Keeland house. At the time of the arrest a single wagon track was observed by both Bottins and Sylvanus Bean. From the tracks of the horses attached to it, it appeared to have been made by some one driving out from the upper road and following the coulee down by the place where the beef was found, in the direction of the Keeland house. It was not followed by either witness for more than one hundred yards below. Bean took the defendants from the place of the arrest to a ranch house near by, owned by one Day, leaving their team behind. Having obtained saddle horses, the three returned, accompanied by Leo Brown, whom they found at the Day house. They loaded the beef, the hides, and the heads into the wagon, and then went to the Bean house. They all remained there that night. On the next morning the defendants were taken to Glendive by Bartley, the deputy sheriff, who had come for that purpose at the request of Bottins, and were held for trial. The portion of the hides showing the brand, together with the ear-marks, were preserved by the sheriff, and were introduced at the trial. The beef was also taken to Glendive and exhibited to the sheriff and Sylvanus Bean, who was at Glendive at the time of the arrest. On the way from the Day house to the place of arrest Brown and Keeland rode together some distance behind Bean and Randerhoff. Being questioned as to a state-

ment then made by Keeland, Brown testified: "Mr. Keeland said he was in a little jackpot, and would like to have me talk to Mr. Bean and get him to settle it. That is all he said." This was in reply to an inquiry of him by the witness as to what the trouble was. At another place in his testimony he stated: "When we got down to the Bean ranch, Keeland, Randerhoff and I waited outside a few minutes, and Mr. Bean went down to the house. Keeland called me off to one side. I don't think Randerhoff was close enough to hear. * * * The earmarks are on the heads and the brands are on the hides, and he said he would give me fifty plunks if I would let him cut the brands and the earmarks off of the heads and hides. By fifty plunks I understood him to mean \$50. I told him I would not do it; that it would be showing neither of them a fair deal." Bartley testified to a statement made to him by Keeland while they were on the way to Glendive, as follows: "We had dinner at Clemon's place, and Keeland and I had some conversation there. I think Randerhoff heard our conversation. The remark he made to me was that he and Doc had been good friends, and he did not see why Doc did not give him the tip 'before he went after me,' and I said I didn't know why he did not give him the tip. He said he and Doc had always been good friends. Palmer lives close to him. I left the impression on his mind that Palmer came after me. At the same time he said something to me about his bond. * * * He says: 'When I get to town, I will give bond there, and, if I do, they will have to catch me again.'" From the testimony of Charles F. Bean and other witnesses it appeared that the "7L" brand was Bean's recorded brand; that he used the "swallow fork" mark besides; that Bean had cattle running on the East Red-water range in Dawson county, near his ranch; and that they were accustomed to range there. This witness and Larson, the sheriff, who examined the beef after it was brought to Glendive, both stated that they had been in the stock business for many years, and had frequently observed the flesh of animals that had been killed and bled, and also that of animals that had not

been bled. They then stated that the animals from which the beef in question had been obtained had been killed and properly bled. No witness was able, from any mark or indication on any part of the animals, to express an opinion as to how they had been killed. Neither did Charles F. Bean or any other witness state that Bean had recently lost any heifers or that the general appearance of the heads or hides showed similarity to the cattle owned by Bean. The arrest was made in Dawson county.

The testimony of the two defendants was to the effect that they knew nothing of the concealment of the beef in the coulee until they were arrested; that at that time they were on their way up the coulee to get a load of wood, and did not know that the beef was there until they were stopped by Sylvanus Bean, and their attention was called to it by him. They also introduced the testimony of several witnesses which tended to show that they had for several days prior to the time of their arrest been busily engaged at work on the ranch, and had had no opportunity to get out upon the range. They both denied making any statement whatever to Bean, Brown, or Bartley.

The statute (sec. 8645, Rev. Codes) declaring the stealing of any of the animals named therein, including heifers, to be grand larceny, refers to live animals of whatever value. Under the charge in the information, therefore, the defendants could not be convicted of a larceny of the beef, no matter what its value may have been. The jury were therefore properly instructed that they should return a verdict of acquittal, unless the evidence satisfied them beyond a reasonable doubt that the defendants killed, or took part in killing, the heifers in question, or one or more of them, with the intent to deprive the true owner of his property. They were also properly instructed that it must appear beyond a reasonable doubt that the heifers were the property of Charles F. Bean, and were killed in Dawson county.

Counsel for defendants made the contention that, as the evidence is entirely circumstantial, it furnishes no legal support

for the finding of the jury, because the *corpus delicti*,—that is, the larceny of animals belonging to Charles F. Bean—may not be allowed to rest upon this character of evidence alone; in other words, that this element of the case must have been proved in part at least by direct evidence. It is true that the evidence is entirely circumstantial; yet this furnishes no reason why the conviction should not be sustained. While the defendant is not required in any case to answer the charge against him in the absence of evidence upon the part of the prosecution sufficient to establish the *corpus delicti*, yet it is not essential in all cases that it must be established in whole or in part by direct evidence. This statement of the rule applicable is substantially that of Mr. Justice Hawley in *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433, in which the facts bear striking similarity to the facts in this case. In *State v. Keeler*, 28 Iowa, 551, it is said: "The rule should be adhered to with the utmost and strictest tenacity that the facts forming the basis of the offense, or *corpus delicti*, must be proved, either by direct testimony or by presumptive evidence of the most cogent or irresistible kind. In one of these methods the essential fact or facts must be established beyond a reasonable doubt. But if thus established, or if the jury can be and are satisfied of such facts beyond this reasonable doubt, it matters not whether they are conducted to this result by direct or presumptive evidence. In other words, while the proof should be clear and distinct, it is not necessary that it should be direct and positive; for, while that which is direct might be more satisfactory—less liable to deceive and mislead—this goes to its weight or effect, and by no means establishes that in no other way can the essential facts be shown with the requisite distinctness and clearness."

In section 1057 of volume 1 of his New Criminal Procedure, Mr. Bishop states the rule thus: "Circumstantial evidence is admissible to the *corpus delicti* the same as to the other parts of the case; and the jury may find a verdict of guilty solely upon it, equally in murder and in all other crimes." So the

rule is stated by Mr. Greenleaf and Mr. Wigmore (3 Greenleaf on Evidence, 16th ed., sec. 30; 3 Wigmore on Evidence, sec. 2081.) Under the statute in this state, however, in cases of unlawful homicide the proof of the *corpus delicti*, so far as it concerns the death of the person alleged to have been killed, must be made by direct evidence. With this single exception as to its application, the rule as stated by these authorities is the correct one, we believe, and applies to all crimes alike. Of course, the crime and the connection of the defendant with it must always be established as independent facts, but, with the exception referred to, both may rest entirely upon circumstantial evidence.

The evidence stated in substance above shows that the animals in question bore the brand and earmarks used by Bean to identify his cattle; that the carcasses were those of animals recently killed and dressed for beef; that the beef had been concealed in the coulee, to be taken away later; that its whereabouts was known to the defendants, as indicated by their attempt to take it away; that one of them, while in the presence of the other, who did not deny it, admitted having killed the animals and that they belonged to Bean; and that this one of the defendants then and subsequently made different efforts, some in the presence of his codefendant and others apparently without his knowledge, to adjust the matter and avoid a charge of larceny, by offering corrupt inducements to those who had made the arrest and had him in charge. These circumstances, while not pointing with absolute certainty to the conclusion that the defendants were guilty of the larceny of the animals, nevertheless furnish a sufficient foundation for an inference of their guilt, which it was the province of the jury to draw.

2. So much, however, cannot be said of the evidence tending to show that the crime was committed in Dawson county. The beef was found in Dawson county; the defendants were arrested there with it in their possession; but the surrounding circumstances about which there is no dispute tend strongly to show that it had been brought from elsewhere to the place of conceal-

ment. This is all of the evidence tending to show the *locus* of the crime. It is a matter of common knowledge that cattle range widely, paying no attention to county or state lines. While the cattle of Mr. Bean may customarily have ranged near his ranch house, along East Redwater creek, this does not tend to show that they did not often stray away to great distances and cross the county lines of adjacent counties or the state line into Dakota on the east. The venue must be proved beyond a reasonable doubt, just as any other fact. In our opinion the proof is not sufficient in this regard to support a conviction. For this reason the defendants are entitled to a new trial.

3. When Sylvanus Bean was questioned as to the statements made to him by the defendants at the time of the arrest, objection was interposed that no proper foundation had been laid for their introduction. A like objection was also made to the admission of the statements of Keeland to Brown and Bartley. The objections were overruled. Counsel now contend that the rulings were erroneous, in that the statements were in the nature of confessions, and that it should first have been made to appear that they were not induced by fear, or threats, or the hope of leniency. The two statements made by Keeland touching the killing of the animals necessarily implied guilt. At the time he made them he was, possibly, wholly unconscious of their import. They were not in response to any question put to him by Bean, but were impelled by the embarrassment produced by his discovery in the act of making final disposition of the property obtained by the larceny. Such statements are mere admissions forming a part of the conduct of the accused and do not partake of the nature of confessions—that is, direct assertions of guilt, the sense in which this term is technically used—and hence do not fall within the rule applicable to confessions. (2 Wigmore on Evidence, sec. 821.) It was not necessary, therefore, that any preliminary foundation should have been laid for their admission. The other statements to this witness and to Brown show that Keeland was seeking by corrupt means a way of escaping from conviction by compounding the felony, after

it became evident that Bean intended to push the prosecution. Such statements have none of the attributes of a confession, and their admissibility is not subject to the same limitation. The statement made by Randerhoff, though it did not amount to a corrupt solicitation to Bean, was otherwise of the same import as those made by Keeland. The same may be said of the statements made to Bartley. The one was a complaint that Palmer had not given Keeland an opportunity to escape, and the other was a threat to escape in case he found that he was able to secure a bail bond. The rulings were proper.

Contention is made that the court erred in permitting Charles F. Bean and Larson to express their opinions as to whether the beef was that of animals killed and properly bled. The ground of the objection was that the subject was not one calling for expert testimony. The ability of a witness to answer the inquiry in question is not within the range of common observation, but can be acquired only by special observation and experience in the cattle business. It was therefore competent to admit the evidence, the witnesses having shown by their preliminary examination that they were qualified. (Rev. Codes, sec. 7887.)

Complaint is made that the court erred in refusing to submit several instructions requested by the defendants. It is not necessary to give special notice to any of them. Upon examination of the charge we find that it covers all the several requests so made. There was no error in refusing them.

The judgment and order are reversed, with directions to the district court to grant defendants a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: I dissent from that portion of the foregoing opinion relating to proof of venue, for the reason that in my judgment the venue was sufficiently established by circumstantial evidence.

MORAN ET AL., RESPONDENTS, v. EBEEY, APPELLANT.

(No. 2,693.)

(Submitted October 9, 1909. Decided October 26, 1909.)

[104 Pac. 522.]

*Justices' Courts—Pleadings—Complaint—Sufficiency—"Account"—Directed Verdict—Error.***Justices' Courts—Complaint—Sufficiency—Copy of Account.**

1. *Held*, that the complaint in an action brought in a justice's court to recover the balance of an account for goods, wares and merchandise, reading as follows: "E. to M. & W. Dr. To balance for merchandise (describing it), \$255.12," was sufficient under sections 7005 and 7007, Revised Codes; *held*, further, that the word "account," as used in the latter section in declaring that a complaint in a justice's court may, *inter alia*, be "a copy of the account," does not mean a list of different items constituting it.

Directed Verdict—Plaintiff's Evidence—Truth of, to be Assumed.

2. On motion for a directed verdict, the truth of the evidence tending to support plaintiff's case is to be assumed, and such evidence must be regarded in the light most favorable to him.

Same—Error.

3. It was error to direct a verdict for defendant in an action to recover the balance of an account, where plaintiff's evidence tended to show that the goods were ordered by, and delivered to, defendant, and that the latter made his original promise to pay for them.

Appeal from District Court, Lewis and Clark County; Thos. C. Bach, Judge.

ACTION by Thomas F. Moran and Joseph N. Weggenman, co-partners, etc., against H. D. Ebey on an open account. From an order granting a new trial, after direction of a verdict for defendant, he appeals. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Galen & Mettler, for Appellant.

Messrs. Clayberg & Horsky, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover the balance due on an account for goods, wares, and merchandise alleged to have been sold and delivered to the defendant. The answer is a general denial. Upon the trial of the cause in the district court the defendant moved for a directed verdict, and this motion was granted. Subsequently the plaintiffs moved for a new trial, and this motion was likewise granted. From the order granting the new trial the defendant has appealed.

We think it appears from the record before us that this action was commenced in the court of a justice of the peace. The complaint shows that it was filed in the justice's court on May 14, 1907, and some of the witnesses testify that they were witnesses upon the trial of this case in the justice's court. But it is contended that the complaint is not sufficient as a pleading in the justice's court. The complaint is as follows:

"Helena, Montana, May 1, 1907.

"H. D. Eby, To Thomas F. Moran and Joseph Weggenman, Copartners Doing Business Under the Firm Name and Style of Moran & Weggenman, Dr.

"To balance for merchandise, consisting principally of meats, poultry, game, vegetables and market produce, at Helena, Montana, between November 20, 1906, and March 29, 1907, \$255.12."

Sections 7005 and 7007, Revised Codes, provide: Section 7005. "Pleadings in justices' courts are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended." And section 7007: "The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account * * * upon which the action is based." It is contended that this complaint is not "a copy of the account upon which the action is based"; and the definition of the term "account" as given in 1 Cyc. 362 is relied upon. But, even conceding that the definition there given is

the one generally accepted, still it does not govern in this instance, if the Code expressly or by fair intendment limits or qualifies that definition. It is said that the term "account" comprehends a list of items, whether debits or credits; but that this is not the meaning of the term as used in section 7007 above seems manifest from section 7016, which deals with the same subject matter, viz., pleadings in justices' courts. Section 7016 provides: "When the cause of action * * * or counterclaim, arises upon an account * * * the court may, at any time, require either party to furnish to the other the items of an account or a bill of particulars." If the term "account," as used in section 7007 above, was intended to comprise a list of the items, the legislature in section 7016 would doubtless have used the terms "copy of account or bill of particulars," but it did not do so. It used the term "bill of particulars" as synonymous with *items of an account* as distinguished from the account itself.

Some reliance is placed upon the decision of this court in *Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427. In that case all that we decided was that, in an action upon an account stated, the defendant is not entitled to demand a bill of particulars. But in that case we were considering section 6569 (section 743, Code Civ. Proc. 1895), which seems to use the term "account" interchangeably with "items of account," and this fact justifies the language employed. But the very fact that under section 7016 the defendant may demand a bill of particulars or the items of an account would seem to imply that the legislature did not use the term "account" in section 7007 in the same sense that it is used in section 6569 above. There is not any reason for requiring the plaintiff to furnish the items of the account in his complaint, so long as the defendant may obtain them under the provisions of section 7016.

In *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 4, the complaint filed in the court of a justice of the peace was in the following form: "Complaint, Santa Barbara, October 20, 1879. The Santa Barbara Gas Co. Dr. to Maria Antonia Lataillade. To balance due on rent of land, two hundred and fifty dollars."

And of that complaint the court said: "The complaint filed in the court of the justice of the peace was sufficient to uphold a judgment by the justice, and sufficient, in the absence of special demurrer, to sustain the judgment of the superior court." Again, in *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720, the same court said: "Pleadings in justices' courts must be construed with great liberality, and if the facts stated are sufficient to show the nature of the claim or defense relied upon, nothing further is required." The statute of California under which these cases were decided is identical with our own.

We think the complaint in this action is sufficient to enable a person of common understanding to know what is intended, and this is the test prescribed by our Code, in section 7005 above, and is the general rule applicable in justices' courts. A general discussion of this subject may be found in 12 Ency. of Pl. & Pr. 711, where a number of examples of pleadings, held to be sufficient, is given.

It is next urged that the trial court was correct in directing a verdict for defendant, and therefore erred in granting plaintiffs a new trial. In *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871, this court said: "If substantial evidence had been introduced prior to the motion, which in any way or manner tended to support plaintiff's contention, then the weight of the evidence became a question for the jury, and the court properly refused a motion to direct a verdict for the defendant." And again, in *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038, we held that on a motion for a directed verdict the truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light. In view of these rules, then, it is only necessary to consider plaintiffs' evidence, for no matter how emphatically defendant's evidence contradicts it, or how many witnesses defendant may have had in support of his defense, if the evidence offered by the plaintiffs, when considered in the light most favorable to them, tends in any way or manner to support their contention, then the weight of the evidence became a

question for the jury, and the court erred in directing a verdict for the defendant.

The plaintiffs offered in evidence the sale-books of the original entries. These show that the items were charged to defendant from November 21, 1906, to December 28, 1906; that from December 28 to January 1, 1907, they were charged to Wm. Youts, or Yutz. The items sold on January 2d are charged to defendant, and defendant's name partially erased, and the words "West Hotel" written in lieu thereof. All the other items are charged to "West Hotel." The bookkeeper for plaintiffs testified that she opened this account with the defendant at the direction of plaintiff Weggenman, that upon December 28 she understood that defendant objected to having the items charged to him individually, because he was employed by the government, and that she took it for granted from this fact that she was to charge the items to Yutz, and did so until about January 1, when plaintiff Weggenman, discovering this fact, directed her not to use the name of Yutz on the sale slips, but to use the name "West Hotel," and pursuant to this direction the slips thereafter were made out to "West Hotel." The plaintiff Weggenman corroborates this, and, besides, testifies that upon November 22 defendant and Yutz came to plaintiffs' place of business, and defendant then said to him that he was sorry that plaintiffs had been "caught" by a former lessee of the West Hotel; that defendant had taken the hotel back and was going to run it himself; that Mr. Yutz would do the buying, and for plaintiff to give Yutz whatever he called for, and charge the same to defendant; that defendant himself came several times and ordered goods for the hotel, and at other times came and inquired why articles ordered had not been delivered. This plaintiff further testified that the plaintiffs furnished the items shown by the books, and that he had the items sold after January 1, 1907, charged to "West Hotel" to accommodate the defendant, and explained that such method was frequently employed in a case of that kind. Plaintiffs' ledger was also introduced in evidence, showing that

all these items were there charged to the defendant. The reasonable value of the articles is admitted.

We think the foregoing summary of the evidence offered on behalf of the plaintiffs is a fair statement of it, considered in its most favorable aspect, and upon this evidence the trial court clearly erred in directing a verdict for the defendant. If believed by the jury, it tended to show that all of the goods, except possibly those ordered on November 21, 1906, were ordered by and delivered to the defendant, and that defendant made his original promise to pay for them. And in this view of the case the trial court properly granted plaintiff's motion for a new trial, since it was clearly error, upon this showing, to direct a verdict for the defendant. While the evidence also seems to be sufficient to justify the plaintiffs in charging the items of November 21, 1906, to defendant, it is not necessary to consider that matter on this appeal.

In this disposition of the case we have not considered the question which was presented and decided in *Sanden v. Northern Pacific Ry. Co.*, ante, p. 209, 102 Pac. 145, and again considered in *Sutton v. Lowry*, just decided.

The order granting a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

GIRARD, PLAINTIFF, v. McCLEARNAN, DISTRICT JUDGE, DEFENDANT.

(No. 2,776.)

(Submitted October 11, 1909. Decided October 29, 1909.)

[105 Pac. 224.]

Mandamus—Bills of Exceptions—Amendments—Delivery to Judge—Notice—Settlement—Practice.

1. Defendant prepared a bill of exceptions to be used on his motion for a new trial, and on July 8 served same on counsel for plaintiff, who, on July 17, served certain proposed amendments. These not having been accepted, counsel for movant, on July 24, delivered the proposed bill and amendments to the judge. At the time noticed for the settlement of the bill, July 30, opposing counsel objected to its settlement on the ground that the papers had not, within ten days after service of the amendments, been presented to the judge for settlement, upon five days' notice to objecting counsel. The district judge refused to settle the bill. *Held*, on *mandamus*, that this was error, inasmuch as under section 6788, Revised Codes, a party may within ten days after service of the amendments (1) present the bill with the amendments to the judge upon five days' notice to the adverse party, or (2) deliver them to the clerk, or (3) deliver them to the judge, and that defendant, having chosen to deliver them to the judge directly, was relieved from giving the five days' notice; *held*, further, that upon delivery of the papers to him it became the duty of the judge to settle and sign the bill immediately or at some future date fixed for that purpose.

ORIGINAL APPLICATION by Edward Girard for a writ of *mandamus* to compel Honorable John B. McClernan, a judge of the district court of Silver Bow county, to settle and sign a bill of exceptions. Writ granted.

Mr. J. L. Wines filed a brief in behalf of Plaintiff, and argued the cause orally.

There was a brief for Defendant, by *Mr. John J. McHatton* and *Messrs. Coleman & Cohen*; oral argument by *Mr. I. A. Cohen*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

During the month of May, 1909, there was tried in the district court of Silver Bow county, and in that department over which

the Honorable John B. McClernan presides, a certain action entitled: John J. McHatton, plaintiff, v. Société Anonyme Des Mines de Lexington, a corporation, Edouard Berthemet, Louis Girard and Charles C. Reuger, defendants; and such trial resulted in a verdict and judgment in favor of the plaintiff. Within due time the defendant Girard gave notice of his intention to move for a new trial, and that his motion would be made upon a bill of exceptions thereafter to be prepared. The trial court granted him until July 9 to prepare and serve his bill of exceptions. On July 8 a draft of such proposed bill was served upon the attorneys for McHatton, and on July 17 certain proposed amendments to the bill were presented to, and served upon, counsel for Girard. These amendments were not accepted. On July 24 counsel for Girard delivered the proposed bill and amendments to Judge McClernan, who ever since has had them. The proposed bill was noticed for settlement for July 30, at which time counsel for McHatton, being present, interposed an objection to the settlement, and the hearing was continued until August 7. On July 31 counsel for Girard gave written notice of the hearing for August 7, and on August 7 counsel for McHatton filed written objections to the notice last above mentioned. Judge McClernan being absent on August 7, no further proceedings were then taken. Sometime subsequently Judge McClernan fixed September 4 as the time for considering the settlement of the proposed bill and hearing the objections to such settlement. On September 4 the hearing was again continued until September 7, on which last-named day a hearing was had; and on the 11th of September the objection interposed by counsel for McHatton to the settlement of the proposed bill was sustained, and Judge McClernan thereafter refused to settle the bill. Counsel for Girard then applied to this court for a writ of mandate to compel Judge McClernan to settle the bill of exceptions, and in the affidavits filed in support of the petition sets forth the foregoing facts and others not necessary to be noticed now. Upon the return of the alternative writ a motion to quash was first interposed, and this be-

ing overruled *pro forma*, an answer was filed, but the answer merely sets forth the proceedings somewhat more in detail and does not raise any issue of fact. The matter was then submitted to this court for determination.

In the view we take, it is wholly immaterial that notices for the several hearings upon the settlement of the proposed bill were given by counsel for Girard, and the objections made by McHatton on August 7 to the notice given by Girard on July 31 were therefore not of any avail, and Judge McClellan must have acted upon the objection made by counsel for McHatton on July 30. Recalling, then, that the proposed bill was served on July 8, that the amendments were served on July 17, that the proposed bill and amendments were delivered to the judge by Girard on July 24, and that July 30 was the first day upon which settlement was sought, the full import of McHatton's objection to a settlement on that day becomes apparent. The objection is that the proposed bill and amendments were not, within ten days after the amendments were served, presented by Girard to the judge for settlement upon five days' notice to McHatton. This objection was sustained, and evidently upon the authority of *Burns v. Napton*, 26 Mont. 360, 68 Pac. 17.

Burns v. Napton was an original proceeding in this court, by Burns to compel Judge Napton to settle a bill of exceptions in the case of *Burns v. Kelly*, in which latter case Kelly had prevailed. On June 3 Burns had prepared and served a proposed bill of exceptions, and on June 4 had delivered it to the clerk of the court. On June 11, Kelly proposed and served amendments, which were not accepted. On June 25 Burns gave notice that the proposed bill and amendments would be presented for settlement on July 1. It did not appear that Burns, the moving party, ever delivered or presented the amendments to the court, judge or clerk, and in disposing of the matter this court said: "In the case at bar the plaintiff neither presented the proposed bill and amendments to the judge (on notice or without notice) nor delivered them to the clerk within ten days after June 11, which was the day on which the amendments were

served"; and relief was denied to Burns. The court further observed: "We remark, in passing, that if the delivery of the proposed statement on June 4 had been followed by a delivery of the proposed amendments within ten days succeeding the service of them, with the avowed intention on the part of the plaintiff to leave both the statement and amendments for the judge, the statute might have been satisfied in the respect mentioned; the delivery of the amendments to the clerk for the judge would doubtless be tantamount to a new delivery of the statement." But the court fell into error in pronouncing an *obiter dictum*, as follows: "If, however, the amendments are not agreed to, the party seeking settlement must, unless the time be enlarged or sufficient excuse for delay be shown, do one of two things within ten days after the service of the proposed amendments: First, he must present the proposed bill and amendments—not one, but both—to the judge upon five days' notice to the adverse party; or, secondly, he must deliver the proposed bill and amendments—not one, but both—to the clerk of the court for the judge. Such is the plain language and meaning of section 1155, *supra*." Section 1155, Code of Civil Procedure of 1895, now section 6788, Revised Codes, does not contain the language attributed to it by the learned justice who wrote the opinion. The section does provide: "The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court, *or* judge." The opinion in *Burns v. Napton* would lead one to suppose that the language is, "or be delivered to the clerk of the court *for* the judge"; but that is not correct. The language is, "or be delivered to the clerk of the court, *or* judge." The word "or" is not a misprint. It is contained in the enrolled bill of the Act on file in the office of the Secretary of State; and that it was used advisedly, or at least intentionally, a history of the statutes relating to the settlement of bills of exceptions seems clearly to indicate.

Section 281, First Division, Revised Statutes of 1879, provides: "The point of the exception shall be particularly stated, except as provided in relation to instructions, and may be delivered in writing to the judge, or if the party require it, it shall be written down by the clerk. * * * When not delivered in writing, or written down as above, it may be entered in the judge's minutes, and afterward settled in a statement of the case as provided in this Act. * * * " This section related to the allowance of exceptions taken during the course of a trial; but it likewise governed in the settlement of a bill of exceptions in support of a motion for a new trial, as shown by subdivision 2 of section 287. The settlement of a statement of the case was governed by subdivision 3 of section 287; and it was in this latter subdivision that the clause "or delivered to the clerk of the court for the judge" is to be found. But that subdivision related to the settlement of a statement of the case, as distinguished from a bill of exceptions. These same provisions remained in force and were carried into the Compiled Statutes of 1887, as sections 291 and 298, respectively, of the First Division. There was also added a provision contained in section 294; and these provisions continued in force and are brought into the Code of Civil Procedure of 1895. Under the Revised Statutes of 1879, there does not appear to have been any direct provision for the settlement of a bill of exceptions, but the practice prevailed of having such bill settled immediately. To a certain extent this apparent oversight was corrected in the Compiled Statutes of 1887, by the addition of the provision found in section 294, referred to above; but with this added provision the proposed bill could still be delivered *to the judge*.

In the Code of Civil Procedure of 1895, the subject "exceptions" is treated in sections 1150-1158, inclusive, and in subdivision 2 of section 1173. Section 1155 provides: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may * * * prepare a draft of a bill, and serve the same, or a copy thereof, upon the adverse party. * * * Within ten days after such service the adverse party

may propose amendments thereto and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court, or judge." A provision for the settlement of a statement of the case, similar to the provision contained in subdivision 3 of section 287, Revised Statutes of 1879, and subdivision 3 of section 298, Compiled Statutes of 1887, is found in subdivision 3 of section 1173, where the same clause, "or be delivered to the clerk of the court for the judge," is found; but in the same connection, viz., with reference to the settlement of a statement of the case, as distinguished from a bill of exceptions. By an Act of the tenth legislative assembly (Laws 1907, p. 89), section 1173 was so far amended as to eliminate subdivision 3 altogether, and such amendment likewise eliminated from the Code of Civil Procedure the clause "or be delivered to the clerk of the court for the judge"; but the section as thus amended still retained the provision of subdivision 2 above. Sections 1155 and 1173, as thus amended, are carried into the Revised Codes of 1907 as sections 6788 and 6796, respectively. And thus the law stood at the time this controversy arose.

It is conceded in the brief of counsel, and is perfectly apparent from the papers before us, that counsel for Girard proceeded under section 6788, Revised Codes (sec. 1155, Code Civ. Proc., 1895), and under the provisions of that section he could fully comply with the law if, within ten days after the amendments were served, he either (1) presented the proposed bill and amendments to the judge, upon five days' notice to the adverse party, or (2) delivered them to the clerk, or (3) delivered them to the judge. He chose the third alternative, but was fully within the law.

The provision of the law authorizing the moving party to *present* the proposed bill and amendments to the judge first appears in the Code of Civil Procedure of 1895, and under that

provision the moving party assumes the burden, not only of moving in time, but of giving his adversary the required notice. The district judge has not any cognizance of the matter until the time for the settlement arrives; but the moving party is not limited to this remedy. He may choose the third alternative and deliver the bill with the proposed amendments to the judge directly, as was the practice in the early days of the territory; or he may deliver the proposed bill and amendments to the clerk. If the moving party pursues either the second or third remedy above, he is relieved from further responsibility. It is true that there is no procedure provided for the settlement of the bill when the proposed bill and amendments are delivered to the judge himself; neither was there in the Revised Statutes of 1879, or in the Compiled Statutes of 1887; but no difficulty whatever was experienced on that account. We think the statute clearly implies that the judge shall settle immediately or fix a subsequent date for settlement.

In the present instance, then, the proposed bill and amendments having been delivered to the judge within the time limited by statute, it became the duty of the judge to settle and sign the bill at that time or at such future time as he might designate; and having thereafter designated September 4, and then continued the hearing until September 7, he should then have settled the bill by making it conform to the truth, and should then have signed and allowed the same. In so far as the decision in *Burns v. Napton* is contrary to the views herein expressed, that decision is modified.

It is ordered that a peremptory writ of mandate issue, directing Judge McClernan to settle the proposed bill of exceptions and to sign and allow the same.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. PEMBERTON, APPELLANT.

(No. 2,696.)

(Submitted October 25, 1909. Decided October 30, 1909.)

[104 Pac. 556.]

*Criminal Law—Robbery—Information—Sufficiency—Waiver—
Offer of Proof—Refusal—Evidence—Admissibility—Instruc-
tions—Harmless Error.*

Robbery—Information—Sufficiency.

1. An information charging that defendant did willfully, feloniously, etc., and with force and fear, commit the crime of robbery on one M., and taking from his person and immediate presence, with force against his will, certain articles of value, etc., was not fatally defective because charging the offense in the form of participial clauses instead of by direct allegation. The pleading was such as to enable a person of ordinary understanding to know what was intended to be charged, and therefore sufficient, under sections 9147, 9156, Revised Codes.

Same.

2. Nor was the information above set forth, objectionable because, instead of charging, in the words of the statute (Rev. Codes, sec. 8309), that the taking was accomplished "by means of force or fear," it alleged that it had been accomplished "with" force and fear; the word "with" being, in this connection, equivalent to the expression "by means of."

Same—Information—Defects—Motion in Arrest—Waiver.

3. Defects in an information which, under section 9200, Revised Codes, must be taken advantage of by special demurrer, may not be urged in support of a motion in arrest of judgment; on such a motion all defects, except that of want of jurisdiction and the insufficiency of facts to state a public offense, are deemed waived.

Same—Offer of Proof—Exclusion—When Proper.

4. Error cannot be predicated on the exclusion of an offer of proof covering a subject fully developed by other testimony.

Same—Evidence—Mental Condition—Remoteness.

5. Defendant, charged with robbery, offered testimony to show that the prosecuting witness, when intoxicated, was subject to the hallucination that he was being or had been robbed, and in support thereof tendered proof to show that some fourteen years before he had a similar delusion. *Held*, that the offer was properly excluded, proof of a single instance of such derangement of mind, at so remote a period, being insufficient to show that the witness was affected with an habitual tendency or disposition to become subject to it whenever intoxicated.

Same—Instructions—Definition of Crime—Harmless Error.

6. Where the court in other portions of the charge had correctly defined the crime of robbery, its failure to instruct, in a paragraph enumerating the material and necessary allegations in the information which the state was obliged to establish beyond a reasonable doubt,

that the property must have been taken from the person or immediate presence of the prosecuting witness, was not prejudicial, in the light of the state's evidence, showing that defendant had assaulted the latter and, after choking and beating him into insensibility, had taken the property in question from his person.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ARTHUR L. PEMBERTON was convicted of robbery, and appeals from the judgment of conviction. Affirmed.

There was a brief by *Messrs. Rodgers & Rodgers*, and *Mr. Moncure Cockrell*, for Appellant; oral argument by *Mr. Hiram Rodgers*.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, submitted a brief on behalf of Respondent; *Mr. Hall* arguing the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was charged jointly with one William S. Ellison with the crime of robbery. He demanded, and was granted a separate trial, and was by the verdict of the jury found guilty. From the judgment entered thereon he has appealed. The charging part of the information is the following: "That said defendants, William S. Ellison and Arthur L. Pemberton, on or about the sixth day of December, A. D. 1907, and before the making and filing of this information, and at and in the county of Powell, state of Montana, did then and there willfully, unlawfully, and feloniously, and with force and fear, commit the crime of robbery upon one John Mathison by willfully, unlawfully, and feloniously, and with force and intimidation, and putting in fear of great bodily harm, him, said John Mathison, and taking from the person and immediate presence of said John Mathison, with force against his will, the sum of two dollars lawful money of the United States, one gold watch and

chain, of the value of fifty dollars, one pocket knife, one bunch of keys and one plug of tobacco (a further or more particular description of which said money and articles being to said county attorney unknown), all of said money and articles then and there being in the possession of said John Mathison, and all of said money and articles then and there being of the personal property, goods and chattels of said John Mathison, with intent in them, said defendants, William S. Ellison and Arthur L. Pemberton, then and there willfully, unlawfully, and feloniously, with force and fear to rob said John Mathison, the true and lawful owner thereof, of the use and benefit and possession of his said personal property, and to appropriate the same to their own personal use," etc.

1. The sufficiency of the information is attacked on two grounds: (1) That the language in which the charge is couched is mere recital and not direct averment; and (2) that it is not alleged that the taking of the property was accomplished by force or fear.

The statute defines robbery as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Revised Codes, sec. 8309.) It is true that the statements of the facts constituting the charge are in the form of participial clauses, instead of direct allegation. This method of pleading is not commended, yet, under the liberal rules provided by our Code, we feel justified in concluding that the form of statement employed does not render it abortive. The statute requires an indictment or information to contain a statement of the facts in ordinary and concise language in such manner as to enable a person of ordinary understanding to know what is intended. (Revised Codes, sec. 9147.) It is sufficient if it meets this requirement. (Revised Codes, sec. 9156.) It cannot be doubted that any person, even of the most ordinary understanding, would know from the reading of this information that the defendant is charged with having feloniously taken from the person or immediate

presence of John Mathison the property described by means of force or fear. This is a fair and reasonable construction of the pleading; indeed, the only one of which it is susceptible.

It is also said that the word "with" does not appropriately express the means by which the taking was accomplished, and hence that one of the elements of the crime, as defined by the statute, to-wit, that it must have been accomplished by force or fear, is omitted from the charge. This contention is also without substantial merit. It is always better that the charge be made in the language of the statute, but the necessity to pursue this course is not imperative in any case. Terms expressive of the same idea may be employed provided only they embody the essential elements of the crime as defined in the statute. It is said that the word "with" denotes accompaniment, and hence that the information is in equal fault with the one held insufficient in *State v. Johnson*, 26 Mont. 9, 66 Pac. 290, in which the words "accompanied by means of force or fear" were used. It is true the term denotes accompaniment, association, proximity, and this is its primary meaning. It likewise denotes the means or instrumentality by which an end or purpose is accomplished, and in this case is synonymous with "by" when used in the same sense. (Century Dictionary; International Dictionary.) In the latter sense it is used here and is equivalent to the expression "by means of."

The information is substantially the same as those considered in *State v. Clancy*, 20 Mont. 498, 52 Pac. 267, *State v. Paisley*, 36 Mont. 237, 92 Pac. 566, and *State v. Howard*, 30 Mont. 518, 77 Pac. 50. The most that can be said of either of the contentions is that the charge is not as direct and certain in its allegations as it might have been, and was therefore open to attack by special demurrer. (Revised Codes, secs. 9149, 9200.) Here the attack was made in the trial court by motion in arrest of judgment; hence all questions arising upon alleged defects in the information, except that of want of jurisdiction and the sufficiency of the facts to state a public offense, were waived. (Revised Codes, sec. 9208.)

2. Upon cross-examination of the prosecuting witness Mathison, he was not permitted to answer the following question put to him by counsel for the defendant: "Q. Mr. Mathison, I want to ask you when you were building the road over here to Rock Creek in the year 1894 that you testified to, if upon that day, in company with Ed Spensely, you were not in town here, and that you and Spensely started out in a wagon, and that you were drunk, so drunk that, when you got out between here and Rock Creek lake, you took your pistol and commenced pulling into the woods, and told Spensely that there were some robbers trying to hold you up, and that he tried to persuade you out of that opinion, you turned around and went to town, and went up to see Nick Bielenberg at the club and some other people there, and if you did not ask them to go on your bonds and told them you had been arrested for killing a man who had tried to rob you on the road between here and Rock Creek." This ruling was upon objection made by the county attorney that the incident called for was too remote to reflect in any way upon the condition of the witness at the time of the alleged robbery, and was therefore immaterial. Counsel for defendant then made an offer to prove by the witness substantially the same facts detailed in the question, but supplementing them by the additional fact that the witness was intoxicated at the time the robbery in question was committed. The court excluded the offer for the same reason. As stated by counsel, the purpose was to enable the jury to draw the inference that the account given by the witness of the robbery was the result of a similar hallucination, and was therefore false. It was competent to question the witness as to his sobriety, or to show by other evidence that he was so much intoxicated that he did not understand what took place, or that he was not able to observe with sufficient clearness to enable him thereafter to identify his alleged assailant. This feature of the offer had already been gone into fully upon the cross-examination of this witness, and subsequently the testimony of other witnesses was introduced tending to show his condition within a few minutes prior to the time of the assault.

Error cannot therefore be predicated upon the exclusion of this feature of the offer. The other feature of it was an attempt on the part of counsel to show an habitual tendency or disposition of the witness to become subject to the particular hallucination whenever he became intoxicated, by proof of the single instance occurring in 1894, about fourteen years before. This cannot be done, any more than proof can be made that a witness is inherently dishonest in character by adducing evidence of a single dishonest act of which he had at some remote time been guilty. This can be done, if at all, only by the testimony of witnesses who speak from knowledge of the attributes and tendencies of the particular person gained by association and observation. As a matter of fact, however, this witness, immediately following the offer, stated in the presence of the jury that no such incident as that related in the offer had ever occurred. There was no error in the ruling.

3. Among the instructions the court submitted the following: "(D) The material and necessary allegations of the information herein and which must be established by the state beyond a reasonable doubt are the following: That the defendant Arthur L. Pemberton either alone or in company with some other person did on or about the sixth day of December, A. D. 1907, and before the making and filing of the information herein and at and in the county of Powell, and state of Montana, willfully and unlawfully and feloniously take from the possession of one John Mathison the property mentioned and described in the information herein or some part thereof. That the said John Mathison then owned said property, or had a right to its possession. That in taking the said property the said defendant intended to steal the same; that is, to deprive the owner permanently thereof. That such taking was against the will of the said John Mathison, and was accomplished either by means of physical force or by putting the said John Mathison in such fear of personal violence that he dared not resist the taking of such property. And the jury must find all these allegations to be true beyond a reasonable doubt before they can convict the defendant. If the

jury do not find from the evidence all these allegations to be true beyond a reasonable doubt, they should acquit the defendant." The contention is that the jury might have found everything stated in this paragraph to be literally true, and yet the defendant was entitled to an acquittal because of the omission to state that the property must have been taken from the person or immediate presence of Mathison. It is true the instruction does not contain the specific statement referred to. Yet, after an examination of the whole charge in the light of the evidence, we are of the opinion that the defendant was not prejudiced. Robbery was elsewhere correctly defined. The evidence on the part of the prosecution tended to show that defendant and Ellison had assaulted Mathison, and, after choking and beating him into insensibility, had taken the articles from his person. There was no question but that every element of the crime was present, if the testimony of the state's witnesses was to be taken as true. Therefore the finding of the jury that the property was taken from Mathison was necessarily a finding that it was taken from his person. The jury could not, therefore, have been misled.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

39	536
40	325

SCILLEY, APPELLANT, v. BABCOCK ET AL., RESPONDENTS.

(No. 2,708.)

(Submitted October 28, 1909. Decided November 8, 1909.)

[104 Pac. 677.]

Default Judgments—Vacating—Abuse of Discretion.

1. *Held*, that the district court abused its discretion in vacating a default judgment on a showing that, while the attorney of the moving party had promised to defend the action, he had failed to file an answer because, being a candidate for public office, he had been so busily engaged in a canvass for votes that he forgot all about the matter.

Appeal from District Court, Carbon County; Sydney Fox, Judge.

ACTION by James Scilley against C. H. Babcock and another. From an order vacating a default judgment, plaintiff appeals. Reversed.

Mr. W. M. Johnston filed a brief in behalf of Appellant and argued the cause orally.

The sole ground upon which it was sought to set aside the judgment was the neglect of counsel. This neglect was inexcusable; the neglect of counsel was the neglect of defendant and, being inexcusable, the court abused its discretion in vacating the judgment. (23 Cyc. 939; *Morris v. Wofford*, 114 Ga. 935, 41 S. E. 56; *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260; *McDaniel v. McLendon*, 85 Ga. 614, 11 S. E. 869; *Schultz v. Meiselbar*, 144 Ill. 26, 32 N. E. 550; *Moore v. Horner*, 146 Ind. 287, 45 N. E. 341; *American Brewing Co. v. Jergens*, 21 Ind. App. 595, 52 N. E. 820; *Parker v. Indianapolis Nat. Bank*, 1 Ind. App. 462, 27 N. E. 650; *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 338; *Reiher v. Webb*, 73 Iowa, 559, 35 N. W. 631; *Welch v. Challen*, 31 Kan. 696, 3 Pac. 314; *Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845; *Trustees v. Allen*, 165 Mass. 178, 42 N. E. 570; *Butler v. Morse*, 66 N. H. 429, 23 Atl. 90; *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Wooley v. Sullivan* (Tex. Civ. App.), 43 S. W. 919; *Sanborn v. Centralia F. M. Co.*, 5 Wash. 150, 31 Pac. 466.)

Brief in behalf of Respondents by Mr. O. F. Goddard, and Mr. H. C. Crippen; oral argument by the latter.

The granting or refusal to set aside a judgment is addressed to the sound legal discretion of the trial judge, and unless there has been an abuse of such discretion the appellate court will not disturb the action of the lower court. (*Williamson v. Cummings R. D. Co.*, 95 Cal. 652, 30 Pac. 762; *Bailey v. Taaffe*, 29 Cal. 423; *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592; *Wat-*

son v. San Francisco etc. R. Co., 41 Cal. 17; *Benedict v. Spendiff*, 9 Mont. 88, 22 Pac. 500.) In the case at bar the defendants present an answer showing an absolutely good defense on the merits, which was doubtless considered by the trial judge, and should be considered by this court, in determining the question as to whether it is not a case which should be tried upon the merits; and also upon the question of the diligence used by the defendants. (*Heardt v. McAllister*, 9 Mont. 405, 24 Pac. 263; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; *Whiteside v. Logan*, 7 Mont. 374, 17 Pac. 34; *In re Davis' Estate*, 15 Mont. 347, 39 Pac. 292; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. Rep. 472, 39 Pac. 909; *Haggerty v. Walker*, 21 Neb. 596, 33 N. W. 244; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Lathrop v. O'Brien*, 47 Minn. 428, 50 N. W. 530; *Peterson v. Coch*, 110 Iowa, 19, 80 Am. St. Rep. 261, 81 N. W. 160.)

MR. JUSTICE SMITH delivered the opinion of the court,

Plaintiff began his action in the district court of Carbon county to reform a written instrument, and enforce specific performance thereof after reformation. The defendants, having been regularly served with process, failed to appear and answer the complaint within the time allowed by law, whereupon, on November 2, 1908, their default was entered, and on December 17, 1908, the court rendered a decree in favor of the plaintiff in accordance with the prayer of the complaint. On January 8, 1909, the defendants served and filed a motion to vacate and set aside the judgment and open the default entered against them, which motion was accompanied by the affidavit of the defendant G. H. Babcock and a proposed answer to the complaint. The affidavit sets forth that, upon being served with process, the defendants employed an attorney residing at Red Lodge to defend the action; that the attorney promised to do so, but failed to appear or make any defense, and allowed the action to go by default. There is in the affidavit an intimation that the attorney acted intentionally in failing to protect the rights of the defendants; but an

affidavit afterward filed by the attorney of his own motion, and other affidavits filed by the plaintiff and his attorney, clearly show that this was not the case, but rather that the attorney, who was a candidate for public office at the time, in the heat of the political campaign and because of the fact that he was busily engaged in the canvass for votes, simply forgot all about the matter. On the showing made, however, the district court set aside the judgment, opened the default, and allowed the defendants to answer. From the order of the court an appeal is taken.

We are of opinion that the court abused its discretion in the premises. (See *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456; *Chambers v. City of Butte*, 16 Mont. 90, 40 Pac. 71; *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303; *Hancock v. Pico*, 40 Cal. 153; 23 Cyc. 939.) The order appealed from is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

FREUND, APPELLANT, v. MURRAY, RESPONDENT.

(No. 2,702.)

(Submitted October 26, 1909. Decided November 8, 1909.)

[104 Pac. 683.]

*Partnership—Dissolution—Torts—Action Between Partners—
Complaint—Insufficiency.*

Partnership—Dissolution—At Will.

1. One member of a general partnership, the duration of which is not fixed by agreement, may dissolve the same at any time.

Same—Action Between Partners—Dissolution—Tort—Complaint—Insufficiency.

2. *Held*, that a complaint which alleged that plaintiff and defendant had been partners as physicians; that as such they used a hospital owned by the latter; that plaintiff, at the solicitation of defend-

ant, had purchased his interest from a former partner of defendant for \$5,000; that about twelve years after the formation of the partnership, defendant, believing that the business, a large portion of which consisted of contracts with employers for the treatment of their employees, was about to greatly increase, and wickedly desiring to exclude plaintiff from such increase, secretly notified the patrons of the firm that plaintiff's connection with the business would soon cease, and solicited their patronage for himself; that defendant had failed to account for certain proceeds of firm business; that while plaintiff was absent, defendant removed his fixtures, instruments, etc., from the hospital and thereafter excluded him from participation in the management of the partnership affairs,—did not state a cause of action at law, as for a tort, to recover either actual or compensatory damages.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by I. D. Freund against Thomas J. Murray. Judgment for defendant, and plaintiff appeals. Affirmed.

For Appellant there was a brief by *Mr. Jesse B. Roote*, and *Mr. James E. Murray*; *Mr. Roote* argued the cause orally.

A partner has no more right to commit a tort as against his copartner than an utter stranger to the partnership. Partners may sue each other on any matter not connected with the partnership as freely, and in precisely the same way, as if they were not partners, for the plain reason that outside of the partnership business they are not partners. (Parsons on Partnership, 3d ed., 295; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; 30 Cyc. 468; *Sewell v. Connor* (Tex.), 23 S. W. 555; *Newsom v. Pitman*, 98 Ala. 526, 12 South. 412; *Ball v. Britton*, 58 Tex. 57; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522.)

Respondent violated his duty toward his copartner when he secretly sought to obtain the firm business for himself, before notifying his copartner of his intention to terminate the partnership. He took the law in his own hands and after secretly contriving to obtain the partnership business for himself, sought to eject and evict appellant from the firm premises without settlement or accounting and exposing him to the ridicule and contempt of the community. The renunciation of a partnership must be in good faith, and it must not be made at an unreasonable time. (*Howell v. Harvey*, 5 Ark. 270, 39 Am.

Dec. 376.) The time and manner in which respondent sought to dissolve the partnership showed fraud, malice and oppression on his part, and appellant is entitled to exemplary damages. (*Cole v. Tucker*, 6 Tex. 268; *Smith v. Sherwood*, 2 Tex. 460; *Craddock v. Goodwin*, 54 Tex. 578.)

Mr. T. F. Nolan filed a brief in behalf of Respondent, and argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that the parties are physicians and surgeons. On February 1, 1894, defendant and one Gillespie, a physician and surgeon, were partners in practice at the city of Butte. The principal business of the firm consisted in treating employees of divers mining corporations and industrial concerns. For the purpose of treating the employees aforesaid, the firm used, as a hospital, a certain building owned by the defendant Murray. The plaintiff, at the solicitation of Murray, purchased the interest of Gillespie in the partnership for \$5,000, and the firm of Murray & Freund was formed. For more than eight years thereafter the "contract work" that came to the firm of Murray & Freund from the Butte and Boston Consolidated Mining Company comprised the chief business of the firm. The arrangement between Murray & Freund and the employers was that the latter deducted a certain sum each month from the wages of each employee, and this sum was paid to Murray & Freund, who continued to use, as a hospital, the building owned by Murray. One-third of all moneys received for such contract work was paid to Murray for the use of the building "and in payment of certain expenses in connection with maintaining the hospital," which was known as the "Murray & Freund hospital." When plaintiff became a member of the firm, the monthly income was about \$1,200. Each party gave his best efforts to building up and extending the business of the firm, the plaintiff devoting his entire time thereto. At the time of the happening of the events of which

plaintiff complains, the monthly income of the firm was about \$1,013. The contract work was, under the arrangement between the parties, to inure to the benefit of the firm; but Murray for two or three years collected certain amounts for such work and retained the whole thereof, but for which fact the business would have amounted to \$2,700 monthly. Defendant believed the business of the firm was about to increase on account of certain commercial activities in Butte, and, after plaintiff was ejected, business did in fact increase to about \$4,500 per month. The hospital was during the whole time that the parties were associated together "used almost exclusively" for the business of the firm, and Murray, by means of the profits derived by him from the partnership business, was enabled to greatly enlarge and improve the same. The hospital was also used for the living apartments and offices of the parties, and the right to use the same for hospital purposes was a valuable asset of the firm. During all of the time plaintiff maintained "his office for meeting, consulting, and treating his patients" in the hospital building. In December, 1906, defendant believed that the business of the firm would soon largely increase, and wickedly desired to exclude plaintiff from sharing in the new business, and desired to exclude plaintiff from participation in the contract work, and take all of the business and profits for himself, and exclude plaintiff therefrom, and formed in his mind a plan to carry his ideas into effect. In furtherance of said plan, defendant secretly stated to divers patrons of the firm that plaintiff's connection therewith and with the hospital would soon cease, and solicited the business of the patrons for himself. He secretly wrote to divers patrons of the firm that plaintiff was no longer connected with the hospital or interested in the business, all without plaintiff's knowledge. On May 3, 1906, while plaintiff was absent, defendant removed his furniture, fixtures, medical instruments, and appliances from the room in the hospital which plaintiff had used as an office. He notified divers patrons of the firm that thereafter the employees of such patrons would not be received or treated in the hospital

if plaintiff had anything to do with such treatment. He published a notice in a newspaper to the effect that plaintiff was no longer connected with the hospital, and that it would thereafter be called the "Murray hospital." The goodwill of the partnership was of great value; and, finally, on or about May 1, 1906, defendant, "after having annoyed, vexed, and harassed the plaintiff as stated, and in divers other ways, and after having pursued for several months prior thereto a course brutal and unfair, and unbearable by anyone of refined sensibilities, maliciously, wrongfully, oppressively, and fraudulently, and in utter disregard of the rights of plaintiff, ejected and excluded plaintiff from participation in the management of the hospital, and ejected and excluded him from participation in all of the partnership business, and denied him all his rights with reference to all partnership business," to his damage in the sum of \$40,000. The prayer of the complaint is for \$40,000 actual damages, and \$40,000 exemplary damages, and costs of suit, and "for such other and further relief as may be proper." General and special demurrers to the complaint were filed by defendant and sustained by the district court of Silver Bow county. Plaintiff elected not to amend, whereupon the court dismissed his complaint and entered a judgment for costs against him. This appeal is from such judgment, and the only question submitted to us is whether the complaint states facts sufficient to constitute a cause of action at law for a tort.

Appellant's contentions are: (1) That the complaint states a cause of action at law, regardless of any statutory provisions relating to partnerships; and (2) that he has pleaded an actionable wrong, by virtue of the provisions of section 5475, Revised Codes, which reads as follows: "In all proceedings connected with the formation, conduct, *dissolution*, and liquidation of a partnership, every partner is bound to act in the highest good faith toward his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." For the reason that he invokes the foregoing Code

provision—and the tenor of his brief seems also to so indicate—we assume the plaintiff admits that the partnership was dissolved by the acts of the defendant, although there is, in the complaint, no express allegation to that effect, or that defendant gave notice of his desire to terminate the relations between the parties.

Section 5494, Revised Codes, provides that a general partnership may be dissolved by the lapse of the time prescribed by agreement for its duration, or by the expressed will of any partner, if there is no such agreement. The partnership pleaded, being general, could therefore be dissolved in the manner above provided, and, as no time was prescribed for its duration, it could be dissolved by either party at will. "The dissolution of a partnership at will may be implied from circumstances; but when not the result of mutual agreement, there must be notice by the party desiring a dissolution, to his copartner, of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party, which signify the exercise of the will of the former that the partnership be dissolved." (*Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Major v. Todd*, 84 Mich. 85, 47 N. W. 841; see, also, 30 Cyc. 651.) The supreme court of Arkansas, in *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376, said this: "As a general principle, contracts subsisting during pleasure are naturally and necessarily dissolvable by the mere exercise of the will of either of the parties, and this is the principle according to the civil law under ordinary circumstances. * * * In cases of equity we think the true rule to be this: That, to enable one partner to dissolve at will the partnership, two things must occur: first, the renunciation of the partnership must be in good faith, and, secondly, it must not be made at an unreasonable time. This is the doctrine of the civil law." The rule laid down in the second paragraph of the foregoing excerpt was not the rule of the common law (see 30 Cyc. 650; *Meysenburg v. Littlefield* (C. C.), 135 Fed. 184; *Blake v. Sweeting*, 121 Ill. 67, 12 N. E. 67; *Carlton v.*

Cummins, 51 Ind. 478; *Koenig v. Adams*, 37 Kan. 52, 14 Pac. 439), and is not the rule in this state, either at law or in equity, unless it is made so by section 5475, Revised Codes, *supra*. This latter question will be hereafter examined.

Assuming, then, that the partnership was dissolved, and that defendant could dissolve it by simply expressing his will to that effect, the question remains: Does the complaint state facts sufficient to show that in so doing he committed an actionable wrong against the person or individual property of Freund? The general elementary rule is that law will not sustain suits between partners. (Parsons on Partnership, 4th ed., p. 269; *Zimmerman v. Chambers*, 79 Wis. 20, 47 N. W. 947.) But, says Professor Parsons (page 302): "So far as there are personal torts, they can hardly have any relation to the partnership, and neither party can be affected in right, obligation, or remedy by the fact that he is a partner. Of torts in relation to the partnership or its property, nearly all will be comprehended either in fraud or waste, for both of which the remedy in equity is prompt and efficacious."

Bearing in mind that one member of a partnership at will may dissolve the same at any time, reasonable or unreasonable, and in the exercise of either good or bad faith, let us examine the complaint in this action, in the light of the authorities, for the purpose of ascertaining whether the defendant committed any actionable wrong against the plaintiff, omitting from consideration, in so doing, section 5475 of the Revised Codes, *supra*. The following is a portion of the text found in 30 Cyc. 468: "For actionable wrongs to the person or to the individual property of one partner, inflicted by a copartner, an action at law will lie. Ordinarily, such an action will not lie for the sale and forcible removal of firm property, or for its use, in violation of the wishes of a copartner; but for the tortious destruction of firm property, for its detention and use under claim of sole ownership, for the wrongful ouster of a copartner from firm premises, or for the wrongful and secret appropriation of

firm property to the use of one partner, the appropriate action at law is maintainable."

The case principally relied upon by the appellant is *Ball v. Britton*, 58 Tex. 57. The complaint in that case alleged, in substance: That plaintiff and defendant entered into a copartnership for the purpose of erecting iceworks and manufacturing and selling ice, by the terms of which defendant was to furnish the money necessary to buy machinery and erect buildings, and plaintiff was to superintend the erection of the works and the operation thereof, the net profits to be equally divided between them. That plaintiff did superintend the construction of the iceworks, put the same in operation, and operate successfully for a few months, during which period the profits amounted to \$3,000, and would have amounted to \$4,000 during the season. That the works would have made clear each succeeding year \$5,000. That after the expiration of a few months, by threats to take his life, by calling him a pauper, a liar, and a thief, and ordering a certain third person to knock his brains out if he attempted to superintend the business, defendant forcibly ejected plaintiff from the business and took possession of the same, and continued to hold it, appropriating the profits thereof to his own use, to appellant's damage in the sum of \$10,000. Plaintiff afterward amended his complaint by increasing his claim for actual damages and demanding in addition thereto \$5,000 vindictive damages. The court said: "Any member of a firm may withdraw from it and [thereby] work a dissolution of the firm. * * * But that is not the state of facts which the petition sets forth. The defendant did not withdraw from the firm. He expelled the plaintiff out of it, and he not only retained all that he had put into it, but he kept all that had been contributed by the plaintiff, except a certain portion of the profits. * * * It is difficult to see how one member of a firm consisting of only two can exclude the other. We think, therefore, the petition sets forth a good cause of action." The court continued: "We think the measure of damages is the value of the services rendered by plaintiff, including his skill,

his time, and labor in constructing and operating the factory, deducting whatever he may have received of the profits, if anything. * * * This would be the measure of his actual damage. Counsel for defendant insist that plaintiff was not entitled to exemplary damages, and refer us to the case of *Railroad Co. v. Shirley*, 54 Tex. 125, to the effect that such damages are not recoverable upon a breach of contract. In the case before us there was a breach of contract, certainly; but there was much more. The plaintiff was with every circumstance of contumely excluded from a business in which he had an interest and from premises in which he had a right to work, at least for the time being. The defendant appears to have taken the law into his own hands and to have closed the partnership in a manner entirely too summary to be sanctioned by a court of justice." In that case there was no limit fixed for the duration of the arrangement between the parties.

In the case of *Sewell v. Connor* (Tex. App.), 23 S. W. 555, the alleged facts were these: The parties mutually agreed to start a newspaper, the defendant to contribute the necessary personal property, and the plaintiff to devote his time, skill, and labor to the operation of the business, and the net proceeds to be equally divided. The paper was established. Plaintiff obtained subscribers and built up a valuable advertising and jobwork business. Considerable stationery was purchased and was on hand when defendant evicted the plaintiff, took possession of all property of the firm, denied plaintiff any rights in the business, and advertised that he had discharged him. No time was fixed during which the partnership should continue. Plaintiff brought his action for services, skill, and labor furnished and expended by him, at the rate of \$100 per month from date of the original agreement, and \$1,000 exemplary damages. The supreme court, on the authority of *Ball v. Britton*, *supra*, held that his complaint, containing the foregoing allegations, stated a good cause of action.

It will be observed that in both of these Texas cases the court proceeded upon the theory, apparently, that although the defend-

ant had the undoubted right to terminate the partnership at any time, he might not do so in a summary manner. In both cases the court seems to have been of opinion that plaintiff could waive any benefits accruing to him under the partnership arrangement and all claims to partnership property, and sue for the reasonable value of the services performed, together with damages by way of punishment on account of the fact that the defendant had summarily discontinued the partnership relation before the plaintiff had derived any benefits therefrom. This is apparent in the first case, by reason of the fact that the court decided that the plaintiff should be charged with the amount of any profits received, and, in the second, by the fact that suit was brought for the value of the services. It is impossible to reconcile either of these cases with the common-law rule that the defendants could rightfully terminate the partnership at will and at any time, and in both cases the plaintiff was allowed to ignore the partnership agreement, by suing on a *quantum meruit* for his services, and at the same time claim vindictive damages for an alleged breach of that agreement.

In the case of *Newsom v. Pitman*, 98 Ala. 526, 12 South. 412, the plaintiff alleged: That he and defendant were copartners; that the defendant maliciously, wrongfully, and without probable cause sued out an attachment against the firm in his own name, and closed up the business; that the matters alleged in the affidavit for attachment were maliciously false; that defendant had no grounds to believe them to be true, and the attachment was made for the purpose of vexing, harassing, and injuring the plaintiff. The theory of the pleader appears to have been that the defendant was guilty of a malicious civil prosecution of the plaintiff. (See *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *McKeller v. Couch*, 34 Ala. 336; *Stewart v. Cole*, 46 Ala. 646; 26 Cyc. 13.) The supreme court of Alabama said: "No attachment would lie at his [plaintiff's] suing against a firm of which he was a member. If the allegations of the complaint are true, the attachment was an illegal and violent procedure of the defendant to accomplish a dissolution of the firm,

to oust one of the partners therefrom, and take possession of the property of the copartnership, without reference to the rights of the plaintiff in it and to his great damage, as alleged in the complaint. It ought not to have been done. The law gives a remedy for the wrong, and the plaintiff has not misconceived his action in the complaint he has filed." The report of the case does not inform us what was claimed by the plaintiff in the way of damages, and no cases are cited in the opinion. Indeed, the learned judge who wrote the same advances no reasons in support of his conclusions.

The only other case of importance cited by the appellant is that of *Murray v. McGarigle*, reported in 69 Wis. 483, 34 N. W. 522. In that case the plaintiff was permitted to maintain an action for damages against his copartner and a number of others for conspiracy to injure the business of Murray & McGarigle and drive the plaintiff out of the coal business conducted by the firm. That case is clearly distinguishable from the one at bar. The plaintiff alleged that by reason of the fraudulent conspiracy he was ruined and driven out of the coal business, and was obliged to and did quit and abandon the same, and was deprived of and lost his share of the profits upon any sales and contracts before made by him, and upon any sales and contracts which he might otherwise have made, and was greatly damaged in his reputation and business, to his damage in the sum of \$10,000. Equity could afford no relief in such a case. The conspiracy itself had no connection with the business of the firm. Plaintiff sought relief against others than his partner, which relief could only be afforded in a court of law. The court said: "It may be true that this defendant [McGarigle] and the plaintiff were partners in matters affected by the conspiracy; but he is charged as one of the conspirators, which makes his blame greater and less excusable, and he is not interested in the damages. In such case partners may and should sever. If a third person colludes with one partner in a firm to injure the other partner or partners, the latter can sustain an action. * * * The complaint states every fact

necessary to constitute a cause of action against all of the defendants, and they are all charged as being in the conspiracy and are connected by overt acts, singly or together, to carry it out. The damage is the gist of the action, and they all combined to produce the injury." We have noticed the foregoing cases thus at length, not for the purpose of criticising them, but with a view to showing that the case at bar does not fall within the facts or the principles involved in any of them.

Let us analyze the complaint: (a) There is no allegation that the firm of Murray & Freund owned any tangible property. (b) Each member appears to have professionally treated employees of the various corporations. (c) So far as appears, the firm had no continuing contract with either employers or employees, and the arrangement for treatment could apparently be discontinued at any time. (d) Murray owned the hospital, and it contained no partnership property. (e) The \$5,000 paid by plaintiff for his interest went to Gillespie, and the firm of Murray & Freund continued for about twelve years thereafter. (f) When plaintiff became a member the monthly income was about \$1,200, and that income had decreased to \$1,013. (g) Murray failed to account to plaintiff or the firm for certain sums collected by him; but the amounts so collected are not set forth. (h) The reason why Murray dissolved the partnership was that he had reason to believe that the contract business would greatly increase, and he desired to be alone so that he might make a larger personal profit therefrom. (i) It turned out that Murray was correct in his expectations. (j) The hospital was used for the living apartments and offices of the parties, and the right to use the same was a valuable asset of the firm; but, so far as the complaint shows, neither Freund nor Murray & Freund had any fixed tenure of occupancy, evidenced by a lease or growing out of any oral agreement. (k) Murray stated to divers patrons of the firm that plaintiff's connection therewith would soon cease, and solicited the business of the patrons for himself. (l) Murray secretly wrote letters to the effect that plaintiff was no longer connected with the hospital or interested in the busi-

ness. (m) In plaintiff's absence Murray removed his furniture, fixtures, medical instruments, and appliances from the room in the hospital which plaintiff used as an office. (n) Defendant notified divers patrons of the firm that thereafter the employees of such patrons would not be treated in the hospital if plaintiff had anything to do with such treatment. (o) Defendant published a notice that plaintiff was no longer connected with the hospital. (p) Murray ejected and excluded plaintiff from participation in the management of the hospital and from all partnership business, and denied him all his rights with reference to all partnership business.

These allegations do not show that Murray & Freund owned any property at all. They certainly owned no real estate and no tangible personal property, and the complaint does not disclose that Murray succeeded in getting for himself any of the plaintiff's practice or patients. Indeed, for aught that is alleged, plaintiff may still be enjoying his share of the so-called "contract work," despite Murray's alleged attempt to monopolize the same. It is true there is an allegation that the contract business increased after plaintiff was ejected, and it may perhaps be inferred that the hospital thereafter enjoyed an income therefrom of \$4,500 per month; but there is no allegation that this sum is the total amount of the income from such work, or that plaintiff has lost any patients or income on account of the acts of Murray. There is no allegation that any of the acts of the defendant had the effect of inducing any employer of labor to refuse to allow plaintiff to treat his employees. There is no allegation that any of such acts had any effect on plaintiff's private practice. We undertake to say that the patronage and goodwill enjoyed by a professional partnership attaches to the individual members, rather than to the firm as such, because of the personal skill and experience of the former, and that the latter is, in this respect, different from a commercial partnership. The contract of employment is for personal services, and it is matter of common knowledge that patients and clients continue to employ that physician or attorney in whom

they have the greatest confidence, if they are financially able to do so. There is no averment in the complaint that plaintiff suffered any injury in his reputation or standing, either with his professional brethren or the public at large. No importance can be attached to the fact that Murray induced plaintiff to purchase Gillespie's interest in the firm and to pay the latter \$5,000 therefor. The firm of Murray & Freund continued for over twelve years thereafter, and this certainly is a reasonable length of time for such an association to endure. There is an allegation that defendant failed for two or three years to account for the proceeds of certain contract work; but the form of this allegation is such that it is more in the nature of a proper averment in an action for an accounting than in an action at law for unliquidated damages as for a tort. It is alleged that the right to use the hospital was a valuable asset; but there is no showing that the firm or Freund had any such right. The only logical inference which may be drawn from this portion of the pleading is that, by the sufferance of Murray, the firm used the hospital during the continuation of the partnership relation in consideration of the retention by defendant of one-third of the income of the business. Upon the dissolution of the firm this right ceased, and we think there can be no doubt that defendant was within his strict legal rights in removing plaintiff's personal effects from the room in which they were contained, if he desired to do so, provided the property was not damaged in so doing—and there is no allegation that it was. The allegation that Murray ejected the plaintiff from participation in the management of the hospital and from the business means nothing more than that he refused to allow him to continue as a member of the firm. There is no claim that any personal violence was used or threatened. The only other allegations to be considered are those relating to Murray's notifications to the patrons of the firm and to the public, and his solicitation of future business for himself. As heretofore suggested, no showing is made that any of these alleged acts of the defendant resulted in any injury to the plaintiff, except,

perchance, to his feelings. It may, perhaps, be contended with some show of reason that for one member of a professional firm to anticipate the dissolution of the relation, and to solicit the patronage of firm clients or patients after that event shall have taken place, is of doubtful propriety, and contrary to those ethical precepts which should govern the members of a learned profession; but a court of law cannot undertake to adjust the niceties of the situation, and measure out compensation for so delicate and intimate an injury.

2. But it is contended that section 5475, Revised Codes, *supra*, modifies the rule laid down in section 5494, Revised Codes, *supra*, in so far as the latter gives a right to dissolve a general partnership at the will of either partner, and that by virtue of the former section such renunciation must be made in good faith and not at an unreasonable time. Appellant argues that section 5475, Revised Codes, *supra*, supplemented by sections 6040 and 6047, Revised Codes, gives him an action at law for damages, both compensatory and by way of punishment. These latter sections read as follows:

“Sec. 6040. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault, a compensation therefor in money, which is called damages.”

“Sec. 6047. In any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.”

What has already been said in the process of analysis of the complaint practically disposes of this contention in so far as this case is concerned. If the defendant has not been guilty of any actionable wrong, no damages may be recovered, either compensatory or for the sake of example. It is unnecessary to construe section 5475, Revised Codes, *supra*, in order to reach a conclusion here; but our examination of the authorities has resulted in the discovery of the case of *Richards v. Fraser*, 122 Cal. 456, 55 Pac. 246, which was an action in equity for an

accounting between partners and other relief. In that case a section of the California Code, identical with our section 5475, Revised Codes, *supra*, was applied by the court so as to relieve the plaintiff from the effects of a release given by him to his copartners, he having averred that the same was obtained by concealing from him certain material facts relating to the partnership affairs, and by threats to foreclose a mortgage in the event that he refused to execute the release. The court said: "If the allegations of the complaint are true, then, when plaintiff gave defendants the said acquittance, they obtained a very decided advantage over him by concealing information of their actions, which, as his partners and as trustees for him, they ought to have divulged. Withholding such information was equivalent to false representation operative at the time of the release. * * * "

The case of *Howell v. Harvey, supra*, is cited in the brief of appellant. That was an action in equity for an accounting and for general relief, and the court, after enunciating the principle of the civil law that the renunciation by a partner must be in good faith and not at an unreasonable time, held that one partner should be held to account to his copartner for the profits on a stock of goods bought for his own account after he had declared the partnership relation at an end, acting, however, in bad faith, and at an unreasonable time. We have no doubt that in a proper case equity can and will relieve a partner from the injurious effects of any misrepresentation, concealment, threat, or adverse pressure of any kind, of which his partner has been guilty, *in the partnership affairs*. It is significant that the words italicized are found in the statute; but as the facts in this case are not sufficient to give a court of law jurisdiction, we refrain, as aforesaid, from committing ourselves to any definite interpretation of the statute, section 5475, Revised Codes, *supra*.

The judgment of the court below is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

OWENS, RESPONDENT, v. DAVENPORT ET AL., APPELLANTS.

(No. 2,703.)

(Submitted October 27, 1909. Decided November 8, 1909.)

[104 Pac. 682.]

*Contracts—Illegality—Who may Invoke Defense—Pleading—
Choses in Action—Assignment—Briefs—Error—Waiver.***Contracts—Illegality—Pleading.**

1. The illegality of a contract, to be available as a defense, must be specially pleaded.

Same—Illegality—Who may and may not Invoke Defense.

2. While either party to an agreement may raise the question of its illegality, it may not be invoked by a third party.

Choses in Action—Assignment—Contracts—Illegality—When Defense not Available.

3. O. assigned to D. an order for wages earned in cutting timber. The latter paid O. part in cash and gave him a duebill for the balance, and as a consideration for accepting the order required him to assign to him his claim against his employer. In an action by O. to recover the balance due, D. interposed the defense that the timber had been illegally cut on unsurveyed public land. *Held*, that defendant could not raise the illegal character of the transaction out of which the claim sued on arose, but that his promise to pay, as evidenced by the duebill, was so far a new and independent agreement as not to be tainted with the illegality of the arrangement between plaintiff and his employer.

Briefs—Assignments of Error—Waiver.

4. Assignments of error made in the brief but not argued will be deemed waived.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

ACTION by John R. Owens against J. R. Davenport and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

For Appellants there was a brief by *Messrs. Napton & Napton*, and oral argument by *Mr. H. P. Napton*.

Mr. T. F. Nolan submitted a brief in behalf of Respondent, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by plaintiff to recover from the defendants the sum of \$66.46. The complaint alleges that on December 14, 1905, this plaintiff sold, assigned, and transferred to defendants a certain order in writing, as follows: "Warnock's Camp, Dec. 12, 1905. J. R. Davenport: Please pay to John R. Owens the sum of two hundred and twenty-six and 46/100 (\$226.46) dollars, in full payment to date, and charge the same to my account and greatly oblige, F. W. Warnock"—that defendants then paid plaintiff therefor \$160, and promised and agreed to pay him the further sum of \$66.46 in January, 1906, but have failed and refused to do so. The amended answer admits the sale of the order, and that defendants paid therefor \$75, but deny they ever promised to pay any further sum. As a special defense it is alleged that plaintiff was employed by Warnock to cut mining timbers; that such timbers were cut from unsurveyed government land; that neither plaintiff nor Warnock had a permit from the government to cut the timber; that payment has not been made to the United States for the timbers so cut; and that the amount sued for herein by plaintiff is a balance due for the work so done for Warnock. Upon the trial the plaintiff offered in evidence the following writing, given to him by defendants, as evidence of the balance due: "Received on account. December 14, 1905. due John Owens \$66.46 on Warnock account to be paid in January. J. R. Davenport." The trial resulted in a judgment in favor of the plaintiff, and from such judgment and an order denying them a new trial, defendants appealed.

Only three questions are argued in appellants' brief, and the first of these is disposed of adversely to appellants by the case of *Parnell v. Davenport*, 36 Mont. 571, 93 Pac. 939, which was a companion case to the one before us.

The second question argued relates to the special defense set forth in the answer. It is contended that the agreement between

plaintiff and Warnock, under which the work was done by Owens was illegal, and therefore plaintiff cannot maintain this action upon an account arising out of such agreement. Assuming, without deciding, that in an action by plaintiff against Warnock for wages Warnock could have successfully made the defense that the contract from which the wages arose was illegal, still such a defense would have had to be specially pleaded; and, while either party to such agreement can raise the question of illegality, it is quite uniformly held that such a defense cannot be invoked by a third party. Plaintiff, having an order from Warnock for his wages, took it to these defendants, who paid him \$160 in cash, and gave him the duebill for the balance. But in order that plaintiff should not assert any claim to a right to a lien upon the timbers he had cut for Warnock, the defendants required him, as a consideration for accepting the order and promising to pay it, that he assign to them his claim against Warnock, thereby waiving any claim of a lien. Assuming, then, that the original agreement between plaintiff and Warnock was illegal, still the new promise of the defendants, evidenced by the duebill, was, we think, so far a new and independent transaction that it is not tainted by the illegality of the original agreement, and can properly be enforced. (*Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; 9 Cyc. 563.)

We cannot see that the case is different from what it would have been had Warnock actually delivered the money to defendants, and defendants promised to pay it to plaintiff. Instead of doing just this, Warnock did substantially the same thing. He assigned to defendants the money coming to him from the Original Mining Company, from the sale of the timbers, and defendants agreed to pay the plaintiff the amount due him from Warnock. In principle just such a case is presented in *Barker v. Parker*, 23 Ark. 390. There Barker entered into a contract with Ervin, by the terms of which Ervin agreed to pay a certain sum of money to Barker for doing an illegal act. Ervin's promise was evidenced by a bond. After the illegal act had been done, Ervin paid over the money to Parker, who agreed

to pay it to Barker, but afterward refused to do so. Barker brought an action against Parker, and the latter pleaded that the transaction between Barker and Ervin was illegal. But he was not permitted to maintain this defense. The court said: "If the suit had been upon the bond, no doubt but the defense set up in the second plea of defendant, that the bond was executed upon an illegal consideration—for services rendered in the abduction of Cloud,—would have been a good bar to the action. But the suit was not upon the bond, or the illegal contract. Ervin, the principal in the bond, not choosing to avail himself of the illegality of the transaction to avoid payment, delivered the money due upon the bond to the defendant, to be paid over by him to the plaintiff, etc., and he agreed so to pay it over. This was a contract and undertaking on his part; and, though he was a surety of Ervin in the bond, and a party to the original contract, he was as much bound to pay the money over to the plaintiff as a stranger to the illegal contract would have been. If Ervin was willing to pay the money due on the bond, and delivered it to defendant for that purpose, what right had he to put the money in his own pocket, and to say that Ervin was not legally bound to pay the bond, and therefore he would keep the money? None, we think." We agree with this conclusion. (See, also, *Terry v. Olcott*, 4 Conn. 442.)

In closing the argument in their brief counsel for appellants say: "The cross-examination of witness Davenport was improperly allowed"; but with this we do not agree. We think the evidence adduced well within the rule prescribed in section 8021, Revised Codes.

The other assignments made in the brief are not argued, and are therefore deemed waived.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

ROSS, RESPONDENT, v. SAYLOR, APPELLANT.

(No. 2,895.)

(Submitted October 25, 1909. Decided November 8, 1909.)

[104 Pac. 864.]

*Real Property—Agreement to Convey—Breach—Measure of Damages—Instruction—Harmless Error—Complaint—Striking Pleadings—Verdict—Sufficiency.***Real Property—Agreement to Convey—Measure of Damages—Bad Faith.**

1. Section 6054, Revised Codes, declaring the measure of damages in an action for breach of an agreement to convey an estate in real property, and authorizing recovery of additional damages in case of bad faith, applies to an agreement to convey an equitable as well as a legal estate.

Same—Complaint—Sufficiency.

2. Complaint examined and *held* not to state two separate and distinct causes of action, to-wit, one for breach of a contract to convey real property, and one for damages in tort, as for a fraud, but one to recover damages for a breach of oral contract alleged to have been entered into.

Same—Statute of Limitations—Inapplicability of Defense—Striking Pleading—Harmless Error.

3. Plaintiff's action having been one to recover damages for breach of an oral agreement to convey real property, and not one based upon fraud, the striking of defendant's plea that it was barred by the statute fixing the time within which actions for relief on the ground of fraud must be brought, was not prejudicial. The defense was inapplicable.

Same—Bad Faith—Evidence—Admissibility.

4. Where plaintiff sought to recover damages because of defendant's failure to carry out an oral agreement to convey to him an estate in certain lands in Nebraska, represented by certificates which entitled the holder to the land therein named, and which had been assigned to plaintiff in exchange for land owned by him in this state, but which Nebraska lands had theretofore been sold by defendant's agent to another, evidence that defendant had told plaintiff that the title to the land in Nebraska was clear, was admissible to show the bad faith of defendant in the transaction.

Same—Bad Faith—Proper Cross-examination.

5. Defendant's wife, after having testified in his behalf, was asked on cross-examination to identify certain letters written by her as his agent. The letters disclosed the fact that defendant knew that his Nebraska land had been sold by his agent prior to the date of his agreement to convey to plaintiff. *Held*, that the letters were properly admitted on cross-examination.

Same—Measure of Damages—Instructions—Inapplicability—Harmless Error.

6. The giving of an instruction on the measure of damages, which, though inapplicable to the case as tried, could not have added anything to the measure of relief to which plaintiff was clearly entitled

under section 6054, Revised Codes, and the state of facts proven, was not sufficient to work a reversal of a judgment in his favor, nothing appearing that a different result could be reached on a retrial.

Same—Bad Faith—Measure of Damages—Expenses Recoverable.

7. *Held*, in an action to recover damages for a breach of an agreement to convey real property, that expenses incurred by plaintiff in removing his family to Nebraska preparatory to taking possession of lands sold to him by defendant, as well as counsel fees and court costs paid by plaintiff in defending an action to quiet title, brought against him by defendant's prior grantee, were recoverable as "expenses properly incurred in preparing to enter upon the land," under section 6054, Revised Codes.

Same—Expenses Recoverable—Verdict—Sufficiency.

8. In the absence of an objection to it at the trial, the jury's verdict in a certain sum for "necessary expenses in preparing to take possession of the land," instead of for "expenses properly incurred,"—the words of the statute (sec. 6054, Revised Codes) and those used in the court's instructions,—was insufficient.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Evan A. Ross against C. L. Saylor. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Modified and affirmed.

Messrs. Blackford & Blackford and *Mr. Rudolf Von Tobel* filed a brief in behalf of Appellant; *Mr. W. M. Blackford* argued the cause orally.

The complaint states two causes of action in a single count, each of which is inconsistent with the other,—one on contract and the other in tort, for damages, both on account of his failure to obtain title to the land described in the Nebraska land sale contracts assigned by appellant to respondent. These causes of action were improperly united. (*Nelson v. Great Northern Ry. Co.*, 28 Mont. 298, 72 Pac. 642; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56; *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259.) It was prejudicial error for the trial court to overrule the demurrer interposed on that ground. (*Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259; *Thelin v. Stewart*, 100 Cal. 372, 34 Pac. 861.)

The written assignments show on their face to be nothing more than the sale, assignment and transfer by appellant of all his

"right, title and interest" in the Nebraska land. There are no words of warranty, no covenants of seisin or of future enjoyment contained in either of the assignments. Under this state of facts respondent cannot recover when there is no fraud in the sale. (*Griel v. Lomax*, 86 Ala. 132, 5 South. 325.) "The rule of *caveat emptor* governs purchasers of land as well as of personal property. The vendee must take care that the title he buys is sound. If he has any doubt concerning it, he may require covenants to secure the title as a condition of his purchase. If he makes no such requirement, he takes the risk of the title upon himself, in the absence of fraud, and cannot hold the vendor responsible for its failure." (*Union Pacific Ry. Co. v. Barnes*, 64 Fed. 80, 12 C. C. A. 48; *Patton v. Taylor*, 7 How. 133, 159, 12 L. Ed. 637; *Van Rensselaer v. Kearney*, 11 How. 297, 322, 13 L. Ed. 203; *Noonan v. Lee*, 2 Black, 499, 508, 17 L. Ed. 278; *Peters v. Bowman*, 98 U. S. 56, 60, 25 L. Ed. 91.)

All of respondent's evidence relating to the oral agreement of warranty was admitted over the objection of the appellant. This evidence was incompetent, and having been objected to, the whole evidence stands as if such evidence had been excluded, if incompetent. (Hayne on New Trial and Appeal, sec. 98, p. 273; *Frauenthal v. Bridgeman*, 50 Ark. 348, 7 S. W. 388; *McCloud v. O'Neill*, 16 Cal. 397; *Janson v. Brooks*, 29 Cal. 223; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 424, 46 Pac. 52, 726; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 152.)

Counsel fees paid in defending another's suit against respondent to quiet the title to the Nebraska lands, and the court costs paid in defending that suit and in settling the judgment for costs therein, are not recoverable as damages for "the expenses properly incurred in preparing to enter upon the land" as a punishment for bad faith in the breach of a contract of the kind mentioned in section 6054, Revised Codes; neither can it be said that the expenses paid by respondent in removing his

family from Montana to Nebraska can be recovered as such damage under that provision, in case of bad faith.

There was a brief in behalf of Respondent by *Messrs. De Kalb & Mettler*, and oral argument by *Mr. H. L. De Kalb*.

The contract to convey good title was oral, but did not constitute what appellant is pleased to style an oral warranty. The contract to convey good title to the Nebraska land could not be met short of a conveyance of such title as was contracted for. (*Willard v. Smith*, 34 Mont. 494, 87 Pa. 613; *Close v. Zell*, 141 Pa. 390, 23 Am. St. Rep. 296, 21 Atl. 770.) The contract was not superseded by the written assignments. The written assignments might have been intended to consummate the contract, but amounted to nothing, for the reason that they did not meet the terms thereof. (*Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Close v. Zell*, *supra*.) The assignment of the Nebraska lands did not merge the previous oral contract, because the deed was wholly inoperative as a contract. The courts have held that where there was no title to convey, the vendee may fall back on the contract to convey. (See *Haynes v. White*, 55 Cal. 38.) For a case almost on all-fours with the one at bar, and where the court held there was no merger of the previous oral contract, see *Close v. Zell*, *supra*; also, *Walker v. France*, *supra*. The case of *Close v. Zell* has been cited with approval in *McGowan v. Bailey*, 146 Pa. 342, 572, 23 Atl. 372, 387; *Kemp v. Pennsylvania Ry. Co.*, 156 Pa. 430, 26 Atl. 1074; *Elkin v. Timlin*, 151 Pa. 491, 25 Atl. 139. The charge in the complaint that Saylor transferred the Nebraska lands to Ross, well knowing that he had previously parted with his title thereto, was sufficient to entitle respondent to recover the element of damage allowed by section 6054, Revised Codes. (*Clark v. Yocum*, 116 Cal. 515, 48 Pac. 498; *Messer v. Hibernia Savings & Loan Society*, 149 Cal. 122, 84 Pac. 835; *Yates v. James*, 89 Cal. 474, 26 Pac. 1073.)

MR. JUSTICE SMITH delivered the opinion of the court.

It appears from the transcript that on the fourteenth day of November, 1904, the plaintiff was the owner of one hundred and sixty acres of land situated in Fergus county, in this state, and the defendant had in his possession two certain certificates, called "State University Educational Land Sale Contracts," issued by the state of Nebraska, showing his right to become the owner of certain land in Webster county, in that state, upon the payment of the sum of about \$500, which was the balance of the purchase price thereof. While there is no very specific testimony on the subject, the record of their subsequent conduct discloses the fact that the parties entered into an oral agreement pursuant to which the plaintiff deeded to the defendant the land in Fergus county, and the defendant gave to the plaintiff assignments of the Nebraska land certificates, together with the sum of \$500 in money. The plaintiff testified that, at the time of the transfers, the defendant said: "This land is absolutely clear in title; and, if anything turns up at any time between you and it, I will stand between you and it." It further appears that, upon going to Nebraska with his family to take possession of the land, he found one Norris in possession of the same, claiming to be the owner thereof; that, upon a claim to said land being made by Ross by virtue of the certificates so assigned to him by Saylor, Norris began an action in the district court of Webster county, Nebraska, against the parties to this action, as a result of which the court decreed that Norris was the owner of the land in question and that his title thereto should be quieted as against any claims of either of the parties to this action; that the plaintiff expended \$100 for counsel fees in defending the Nebraska action, paid \$173.55 court costs pursuant to the judgment entered in favor of Norris, and expended \$150 in removing his family from Montana to Nebraska. The object of this action is to recover the value of the Fergus county land, which is alleged to be \$2,500, less \$500 paid to the plaintiff by the defendant, together with the several amounts ex-

pended by the plaintiff in endeavoring to take possession of the Nebraska land, as hereinbefore stated. The principal fact contention of the defendant at the trial was that the plaintiff took said Nebraska land certificates and the sum of \$500 in exchange for the Fergus county lands with full knowledge of the facts in relation to the land certificates, and that no agreement was made by him to hold the plaintiff harmless in case the title to the Nebraska land should be found to be defective. The cause was tried to the district court of Fergus county sitting with a jury, and the result was a verdict in favor of the plaintiff for the sum of \$2,500, which sum the plaintiff confesses is \$76.45 in excess of what the evidence will justify. Judgment was entered in favor of the plaintiff for \$2,443, from which judgment and an order denying a new trial the defendant has appealed to this court.

The first contention of appellant is that the complaint states two separate and distinct causes of action, viz., one for damages on contract, and the other for damages in tort, and that the district court erred in overruling a motion made by him to compel the plaintiff to state these causes of action separately and number the same. The position assumed by the respondent in this court, and the one apparently taken by him in the court below, is that the complaint states but one cause of action, to-wit, an action for breach of an agreement to convey an estate in real property for the purpose of recovering the damages provided for by section 6054, Revised Codes, which section reads as follows: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Respondent contends that the estate agreed to be conveyed to him was of no

value whatsoever, and that the only consideration received by him was the sum of \$500, which amount was to be paid to the state of Nebraska, and that the gravamen of the complaint is that the defendant agreed to convey an estate in real property, while, in fact, he conveyed no estate whatever.

We have carefully examined the complaint, and feel satisfied that the only reasonable interpretation thereof is that contended for by the respondent. If the agreement between the parties had been for an exchange of the Montana lands which the plaintiff owned, for the actual lands in Nebraska, and the defendant had had the legal title to the latter, we have no doubt that a refusal on the part of the defendant to transfer the Nebraska lands to the plaintiff would create a liability for "breach of an agreement to convey real property" in accordance with section 6054, *supra*, provided, of course, that the agreement as entered into was valid and binding upon the defendant. That section reads, as aforesaid, "An agreement to convey an estate in real property"; and we can see, in principle, no difference between an agreement to convey a legal estate and an agreement to convey an equitable one. We therefore hold that the court below was correct in its interpretation of the complaint.

The foregoing also applies to that assignment of error found in appellant's brief which relates to the action of the court in refusing to strike out certain allegations of damages claimed by the plaintiff. The complaint alleges as follows: "That the defendant, in making said sale and transfer to this plaintiff, acted in bad faith, and induced plaintiff to enter into said agreement by fraud and false representations, well knowing that at the time he represented to the plaintiff that he, the said defendant, was seised and possessed of the said lands in the state of Nebraska, that he, the said defendant, had formerly, through an agent, sold, transferred, and assigned all his rights and title in and to said lands to one Charles S. Norris, and received payment therefor, and said representations were made by defendant with intent to deceive and defraud plaintiff, and that plaintiff relied upon the said representations of defendant, and, believ-

ing them to be true, entered into said contract with the defendant, to plaintiff's prejudice and injury as herein set forth." We think this is a sufficient allegation of bad faith to enable the plaintiff to claim the damages provided for in the latter portion of section 6054, *supra*. Without reciting the testimony on the subject, we may say that in our judgment the charge of bad faith was fully substantiated, and the jury must have so found.

One of the defenses interposed by the defendant in his answer reads as follows: "That the cause of action on the ground of fraud alleged in plaintiff's third amended complaint is, and was at the time of the commencement of this action, barred by the statute of limitations, and is, and was at said time, barred by subdivision 4 of section 524 of the Code of Civil Procedure, as amended." The court, on motion of the plaintiff, struck this defense from the answer. The section referred to relates to actions for relief on the ground of fraud or mistake, and, as we interpret the complaint, could have no application to the cause of action upon which the plaintiff relied; and therefore the defendant was not prejudiced in any of his legal rights by having the same stricken from his answer, although it may be questionable whether, in view of the fact that in this state the bar of the statute of limitations is an affirmative defense (see *American Mining Co., Ltd., v. Basin & Bay State Min. Co.*, *ante*, p. 476, 104 Pac. 525), it is strictly proper practice to strike such an allegation from the answer. It will readily be seen that an allegation of this nature might raise a question of fact, and therefore an order striking the same would be prejudicial error.

In addition to the testimony of the plaintiff heretofore quoted, he was allowed, over objection of the defendant, to testify as follows: "I says, 'That land is clear in title, is it?' He says: 'Yes, sir; it is. I will stand between you and any loss.' I says, 'I will accept the proposition.' " Appellant contends that the reception of this evidence was error in that it tended to vary the terms of a written contract by parol, to-wit, the written assignments of the Nebraska land contracts. No other objec-

tion was urged at the trial. No claim is made by the plaintiff that any preliminary written contract of sale was entered into. He said: "It was an even trade. I deeded my land for \$500 paid me by Mr. Saylor and the assignment of these State University educational contracts and the bill of sale of the crop, one-third of the crop that was on the Nebraska land, and that completed the transaction. Then I proceeded to move to Nebraska, and Mr. Saylor took possession of the land that I had conveyed to him. I had no other agreement in writing about this trade; none at all." In the view we take of the case, it was not necessary for the plaintiff to prove an oral warranty of title, and that this was the theory upon which the cause was tried in the court below is evidenced by the fact that the district judge remarked during the course of the trial: "The gist of this action is: Did Saylor, through an agent as alleged, assign these contracts to Norris before he assigned them to this man? If they make that out, they have a good cause of action, whether they had any conversation or not. It looks to me like an executed oral contract." We concur in these views. The testimony received was competent on the issue of bad faith. It tended to show a concealment of the fact that Saylor's interest in the Nebraska lands had previously been transferred to Norris. The record, including therein the defendant's answer, discloses that the latter undertook to convey to the plaintiff some interest, some estate, in the Nebraska land. As a matter of fact he had, before that time, conveyed to Norris, through his agent, all of his right, title, and interest in said land. He had nothing left to convey, and, as was said by the supreme court of Pennsylvania, in *Richardson v. Gosser*, 26 Pa. 335: "It is hard to see how we could deny the plaintiff's right to recover and at the same time satisfy the demands of common justice." As it is not contended that the original agreement between the parties was within the statute of frauds, we have given that question no consideration, contenting ourselves with a decision of the matters found in the briefs of counsel.

During the cross-examination of the defendant's wife, who was a witness in his behalf, and after she had testified that she wrote most of the letters for defendant to his agent in Nebraska who had charge of the sale of the land in that state to Norris, and had shown an intimate acquaintance with the details of the whole transaction, she was asked to identify certain letters from her husband to the agent. These letters disclosed the fact that Saylor had full knowledge that his interest in the land had been sold to Norris before the transfer of the certificate to Ross. After being identified, the letters were offered in evidence by plaintiff, and objected to as not proper cross-examination. The matter of their reception at that time was largely in the discretion of the court; and we find no abuse thereof in overruling the objection. (See, also, Revised Codes, sec. 8027.)

Defendant requested the court to instruct the jury that none of the elements of special damages claimed by plaintiff could be recovered by him. This the court refused to do, and error is assigned. The objection to these items of damages, however, is based upon defendant's contention that this is not an action to recover for breach of an agreement to convey an estate in real property, and, as we have decided that question adversely to him, it follows that his requests for instructions were properly refused.

The court, among other instructions, gave the following: "If you believe from a preponderance of the evidence that the defendant, Saylor, represented to the plaintiff, Ross, that his title and interest in the Nebraska lands was all right, and that he could procure patent for the said lands upon the payment of the sum of \$504, or that he agreed to make good in case title was not right, and that Ross could not secure possession of the said lands, then you are instructed that you should find for the plaintiff, and that his detriment or loss in the case is the price paid, which in this case is the value of the one hundred and sixty acres of Fergus county land, agreed by both parties to be the sum of \$2,000. Otherwise you will find for the defendant, which is, in effect, a finding that the plaintiff has suffered no damage for which the defendant is responsible."

The record shows that the defendant "excepted" to the giving of this instruction, stating his reasons. This method of procedure is not in accordance with the rule laid down by this court in *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837, and *Yergy v. Helena Light & Ry. Co.*, ante, p. 213, 102 Pac. 310; but we are not inclined to invoke the rule ourselves in the absence of a suggestion from the respondent.

As will be observed, the instruction quoted is not in accordance with the respondent's theory of his cause of action as expressed in this court, nor that of the trial judge as evidenced by his remarks heretofore quoted; and it introduced an element of confusion and uncertainty into the case which might have been avoided. However, we are of opinion that the appellant suffered no prejudice thereby. The primary question before the jury was: Did the parties enter into the contract claimed by the respondent? This alleged contract was the foundation of his claim against the appellant. The latter admitted an agreement to exchange his interest in the Nebraska lands for the lands of respondent. The trial court very properly charged the jury that the decree of the Nebraska court was conclusive evidence that the so-called assignment of the land contracts by Saylor to Ross was of no effect, and transferred no interest in the lands to Ross. This being true, a cause of action in favor of Ross immediately accrued, and, as hereinbefore stated, the evidence of Saylor's bad faith in the transaction was so conclusive that no jury could possibly have found that issue in his favor. The statute (section 6054, Revised Codes, *supra*) gave the cause of action for the enlarged measure of damages; so that the court's instruction aforesaid, if the jury applied it in favor of the respondent, might afford an additional reason why Ross was entitled to relief, but could, in fact, add nothing to the measure of that relief. Defendant's liability was fixed and determined by other facts in the case, which the jury must have found against him; and although the instruction, in view of the respondent's avowed position, should not have been given, we are not inclined to reverse the cause for that reason, in the light of the fact that respondent's claim is so manifestly just,

and we see no possible way in which a different result could be reached on another trial. In this connection it must not be forgotten that we are not criticising the instruction as an abstract proposition of law. In a proper case it may be good law; but it was inapplicable to the court's and respondent's theory of this case.

It is contended by counsel for the appellant, but not with any great force—it is merely a suggestion in the brief—that the expenses incurred by the respondent were not “expenses properly incurred in preparing to enter upon the land.” We think there is no merit in the suggestion. It is difficult to see how the respondent could avoid the payment of any of these amounts, and at the same time make a *bona fide* effort to enter upon the land, and keep faith with the appellant.

The jury returned a verdict for \$500 “for necessary expenses in preparing to take possession of the land.” The court in its instructions employed the words of the statute, viz., “expenses properly incurred.” We see no substantial difference between the two expressions, and think the verdict was sufficient in that regard, in the absence of an objection thereto at the trial.

In conclusion we may say that, while indeed there are technical errors to be found in the record, we think they were not prejudicial to the appellant; and in so determining we are solaced by the thought that the jury reached the right conclusion, and that substantial justice was meted out to both parties.

It is conceded that the judgment is \$76.45 in excess of the amount of the verdict. It is therefore ordered that the judgment be modified by the district court by deducting therefrom the sum of \$76.45, as of the date of its rendition, and, as so modified, the judgment is affirmed. The order denying a new trial is also affirmed. Respondent shall recover his costs on appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY concurs in the affirmance.

MR. JUSTICE HOLLOWAY concurs.

GORDON, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
CO. ET AL., APPELLANTS.

(No. 2,697.)

(Submitted October 26, 1909. Decided November 8, 1909.)

[104 Pac. 679.]

*Personal Injuries—Special Damages—Pleading and Proof—
Judicial Notice—Loss of Earnings.*

Personal Injuries—Special Damages—Pleading.

1. Special damages, *i. e.*, damages which are the natural, but not the necessary, result of an injury, must be specifically pleaded.

Same—Special Damages—Pleading—Evidence—Admissibility.

2. Plaintiff alleged in his complaint that while employed about a railway locomotive the water gauge thereon exploded, with the result that the sight of his right eye was destroyed. There was no allegation that the left eye had been injured. Over objection, he was permitted to show that, as a result of the accident, the sight of his left eye had been greatly impaired; he did not introduce any testimony that such impairment was the *necessary* result of the destruction of the right eye. *Held*, that in the absence of such proof, or an allegation specially pleading injury to the left eye, evidence relative thereto was inadmissible.

Same—Judicial Notice—Laws of Nature.

3. While courts may take judicial notice of the fact that destruction of the sight of one eye impairs the power of vision, they may not assume, without proof, that such destruction necessarily affects the sight of the other eye injuriously.

Same—Complaint—Evidence—Inadmissibility.

4. Assuming that an allegation in plaintiff's complaint that he suffered excruciating pain on account of the injury to his right eye was sufficient to admit evidence of pain in the other, it was not broad enough to enable him to show that the sight of the left eye had been greatly impaired.

Same—Loss of Earnings—Proof—Inadmissibility.

5. It was error to permit plaintiff, under his case as made (paragraph 2 above), to submit evidence of loss of time on account of impairment of the sight of his left eye.

Same—Loss of Earnings—Pleading and Proof.

6. *Quære*: May plaintiff in a personal injury action prove loss of earnings without specifically alleging the fact of such loss?

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by Clifford Gordon against the Northern Pacific Railway Company and another. Judgment for plaintiff, and de-

endants appeal from it and an order denying them a new trial. Reversed and remanded.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines filed a brief for Appellants; *Mr. Brown* argued the cause orally.

The allegations of the complaint are noticeable for their absence of any claim for anything other than the injury to the right eye occasioned by the loss of sight therein and the pain attendant thereto. There is no general or broad allegation with reference to general suffering or the possibility of other disabilities under which proof of injuries other than those specified has been allowed in some courts in particular instances. Therefore, the admission in evidence of testimony concerning the condition of plaintiff's left eye, the pain and suffering therefrom, and the effect of the left eye's impairment upon his ability to work, was error. The allegations should be of such a character as to fully and fairly acquaint the defendant with the nature of the testimony upon which plaintiff intends to rely. (*City of Dallas v. McCullough* (Tex. Civ. App.), 95 S. W. 1121; *Joliet v. Johnson*, 177 Ill. 178, 52 N. E. 498; *Cronin v. Street Ry. Co.*, 82 App. Div. 227, 81 N. Y. Supp. 752; *Hess v. Street Ry. Co.*, 57 N. Y. Supp. 222; *Southern Pac. Ry. Co. v. Martin*, 98 Tex. 322, 83 S. W. 675; *Thompson v. Railway*, 111 Mo. App. 465, 86 S. W. 465; *Maynard v. Railroad Co.*, 43 Or. 63, 72 Pac. 590; *Dittman v. Light Co.*, 87 App. Div. 68, 83 N. Y. Supp. 1078.) When a pleader particularizes, he denies himself the implications given by law, and his specifying his damages is taken by the defendant as a bill of particulars, and the latter is not expected to anticipate proof on something not alleged, nor will such proof be admissible.

Where the allegation was as to injury to back, proof of injury to leg held inadmissible (*O'Conner v. Prendergrast*, 99 Ill. App. 531); allegation as to leg, proof of injury to foot inadmissible (*Railway v. Beasley*, 9 Tex. Civ. App. 569, 29 S. W. 1121); allegation of injury to spine, proof as to injury to breast

inadmissible (*Fuller v. City of Jackson*, 92 Mich. 197, 52 N. W. 1075); allegation as to face, proof of functionary trouble inadmissible (*Thompson v. Railway*, *supra*); allegation as to spine and nerve injury, proof as to injury to eyes inadmissible (*Express Co. v. Boyle*, 39 Tex. Civ. App. 365, 87 S. W. 164); allegation of back injury, proof as to loss of sexual power inadmissible (*Jones v. Railway*, 63 App. Div. 607, 71 N. Y. Supp. 647; *Page v. Canal Co.*, 76 App. Div. 160, 78 N. Y. Supp. 454); allegation of sprain, proof of kidney trouble inadmissible (*Railway v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366); allegation of injury to right eye, proof of injury to left eye inadmissible (*Dittman v. Light Co.*, *supra*).

The court also erred in permitting testimony relative to plaintiff's loss of earning capacity to be introduced. There is nothing whatever in the complaint which advises defendants that there would be proof offered as to his diminished power to work, or his losing any work or position by reason of his left eye, or both his eyes. This being true, he was not entitled to submit proof upon it. It is special damages and should, therefore, in the absence of any general allegation, be specifically pleaded before proof is admissible. (*Missouri Ry. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382, 86 S. W. 486; *Fitchburg v. Donnelly*, 87 Fed. 135, 30 C. C. A. 580; *Lodwick L. Co. v. Taylor*, 39 Tex. Civ. App. 302, 87 S. W. 358; *Krueger v. Railway*, 94 Mo. App. 458, 68 S. W. 220; *Finken v. Brass Co.*, 73 Conn. 423, 47 Atl. 670.)

There was a brief by *Messrs. Walsh & Nolan*, in behalf of Respondent, and oral argument by *Mr. C. B. Nolan*.

It is claimed that under the allegations of the complaint no evidence whatever should have been permitted as to the condition of the left eye. If the left eye is affected at all it is affected as an incident of the injury done to the right eye, and it is, therefore, proper to inquire whether or not the visual powers of the respondent are in any manner impaired by the

complete destruction of one eye. Courts are inclined to reasonable liberality in matters of this kind, in the extent to which proof is admitted showing the consequences of the injury. Expressive of that principle, the following cases have been selected from many: An allegation that plaintiff was seriously and permanently injured is broad enough to admit proof of any bodily injury which resulted in impairment of hearing and sight. (*Graham v. Bauland Co.*, 97 App. Div. 141, 89 N. Y. Supp. 595.) An allegation of injuries to the head is broad enough to admit evidence that the injury received caused pressure of and injury to the brain. (*Fleming v. Tuttle*, 98 App. Div. 222, 90 N. Y. Supp. 661.) Proof of uterine trouble is admissible under an averment that plaintiff became sick, sore and disabled. (*Lofink v. Rapid Transit Co.*, 106 App. Div. 202, 94 N. Y. Supp. 150.) Heart trouble and neuralgia may be shown under the averment of serious and lasting internal injury. (*Rice v. Wallowa Co.*, 46 Or. 574, 81 Pac. 358.) A general averment of bodily injury is sufficient to admit proof of particular injuries, objection being first made at the trial. (*Wilbur v. Southwestern Mo. Elec. R. Co.*, 110 Mo. App. 689, 85 S. W. 671.) Averment of injury to head and back, causing great pain and mental anguish and permanent injury to back, authorized proof of fainting and dizzy spells. (*Hollingworth v. Ft. Dodge*, 125 Iowa, 627, 101 N. W. 455.) Where the complaint alleged that the plaintiff was made sick by his injury, proof of the specific diseases which directly resulted from his injury was admissible without a more specific allegation thereof, and proof of the existence of pleurisy was held competent, though not alleged. (*Lauder v. Currier*, 3 Cal. App. 28, 84 Pac. 217.) A declaration alleging that by reason of the injury plaintiff became sick, sore, lame and disabled is sufficient to warrant the admission of evidence to show that the plaintiff suffered from rheumatism as a result of the injury, and that his hearing was impaired. (*Chicago Gen. Ry. Co. v. Kriz*, 94 Ill. App. 277.) In pleading the character of the injury, it is not necessary to give a catalogue of every subordinate result following there-

from in order to introduce proof of such results. (*Cudahy Packing Co. v. Broadbent*, 70 Kan. 535, 79 Pac. 126.) Results of injuries may be proven, though only the injuries are set out in the pleading. (*Snyder v. City of Albion*, 113 Mich. 275, 71 N. W. 475.) The proposition now under consideration was fully discussed in the case of *Montgomery v. Lansing City Elec. Ry. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287. Evidence that plaintiff's general health had been impaired by the injury was properly admitted, though no such impairment had been alleged in the complaint. (*Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232.) The loss of a general prospect of marriage, in the case of a child, by reason of an injury which disfigured her, is a natural consequence of the injury, and may be taken into consideration as an element of general damages without a special allegation in regard to it. (*Smith v. Pittsburg & W. R. Co.*, 90 Fed. 783.) An allegation that plaintiff sustained bodily injuries is sufficient to admit evidence of injury to the eyesight. (*Quirk v. Seigel, Cooper & Co.*, 43 App. Div. 464, 60 N. Y. Supp. 228.) Where the plaintiff alleged that he sustained serious and lasting bodily injuries to his head, limbs and nervous system, it was not error to admit testimony of impaired hearing and eyesight. (*Mullady v. Brooklyn Heights R. Co.*, 65 App. Div. 549, 72 N. Y. Supp. 911.) Where the complaint alleged injuries to the right leg so that it was knocked out of place, became injured and a great strain put upon the whole body, causing a lesion of the kidneys and other internal organs, evidence as to impairment of the eyesight was held to be competent. (*Bodie v. Charlestown & W. C. Ry.*, 61 S. C. 468, 39 S. E. 715.) The case of *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124, is directly in point. There, as here, the injury was caused by the bursting of a water glass, and the allegation was that it suddenly burst, causing the glass, steam and hot water to strike plaintiff in his left eye and injuring it to such an extent as to destroy it. There was no allegation that the injury caused excruciating pain. The court

held that evidence respecting the effect of the injury on plaintiff's right eye was properly admitted.

Evidence as to impaired earning capacity was properly considered as an element of damage. (13 Cyc., p. 187; *Hamilton v. Great Falls*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *El Paso S. W. R. Co. v. Barrett* (Tex. Civ. App.), 101 S. W. 1025; *City of Bloomington v. Chamberlain*, 104 Ill. 268; *Chicago City Ry. Co. v. Hastings*, 136 Ill. 251, 26 N. E. 594; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887; *Doherty v. Lord*, 8 Misc. Rep. 227, 28 N. Y. Supp. 720; *Texas & P. Ry. Co. v. Bowlin* (Tex. Civ. App.), 32 S. W. 918.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1905, the plaintiff, Clifford Gordon, was employed by the Northern Pacific Railway Company, at Townsend. His employment required him to look after locomotives standing in the yards, to keep the fires burning, and to keep sufficient water in the boilers. In order to determine the quantity of water in the boiler, every locomotive is supplied with a water-gauge. This gauge is a glass tube with appropriate fastenings and connections, and indicates the amount of water in the boiler. The plaintiff's employment required him to make a visual examination of this water-gauge at intervals, and, while making an examination on one of the locomotives left in his charge on May 10, 1905, the water-gauge exploded, to use the language of the complaint, and fragments of glass struck the plaintiff in his right eye and destroyed the sight. He brought this action against the railway company and A. B. Ellis, the engineer who brought the locomotive in question into the Townsend yards immediately before plaintiff was injured. It is charged that it was the duty of the railway company to provide a guard for the water-gauge, so that, in case of the accidental breaking of the glass tube, injury to anyone whose duty it was to be about the gauge would not likely result. It is likewise charged that it was the duty of the engineer to see that such guard was in

place, but that, in disregard of such duty, this locomotive in question did not have any guard for the water-gauge. The issues presented the questions of negligence on the part of the defendants, and contributory negligence and assumption of risk on the part of the plaintiff. The trial resulted in a verdict and judgment in favor of the plaintiff, and, from the judgment and an order refusing defendants a new trial, these appeals are prosecuted. While there are several specifications of error, they raise but two questions of serious moment.

1. That part of the complaint descriptive of the injuries received by plaintiff is as follows: " * * * Glass flying at random struck the right eye of the plaintiff, inflicting injuries thereon which resulted in the complete destruction of the sight of said eye, and which injuries occasioned excruciating pain, all to his damage in the sum of * * * ." Upon the trial the plaintiff introduced evidence, over the objection of the defendants, that, as a result of the injury to his right eye, the sight of his left eye was greatly impaired. Counsel for respondent urge upon us three reasons in support of the court's ruling:

(a) It is argued that the damages arising from the evil results to the left eye are general damages, and evidence of them can be introduced without specially pleading the fact of such resulting injury. While the authorities are not always careful in the selection of terms by means of which to express the rules governing general and special damages, the rules themselves are uniformly recognized, and for the purpose of securing fair statements of them it is not necessary to go beyond the authorities cited by counsel for respondent. In opening their argument upon this branch of the case, they say in their brief: "The rule generally recognized is stated as follows: 'All damages that necessarily flow from the injury complained of may be recovered without special averments; but such as are merely the natural or proximate, but not the necessary, result, must be specially averred.' " (5 Current Law, p. 932.)

One of the cases cited by respondent is *Montgomery v. Lansing City Electric Ry. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287, wherein reference is made to the rule as stated by Chitty, as follows: "Whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not implied in the law, in order to prevent surprise of the defendant, which otherwise might ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it." (1 Chitty on Pleading, 16th Am. ed., *p. 411.) Another case relied upon by respondent is *Louisville & N. R. Co. v. Dickey*, 31 Ky. Law Rep. 894, 104 S. W. 329, wherein the rule is taken from Greenleaf, as follows: "Those which necessarily result are termed *general damages*, being shown under the *ad damnum*, or general allegations of damages, at the end of the declaration, for the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them. * * * But where the damages, though the *natural* consequences of the act complained of, are *not* the *necessary* result of it, they are termed *special damages*, which the law does not imply; and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial." (Greenleaf on Evidence, 16th ed., sec. 254.) And also from the Encyclopedia of Pleading and Practice, as follows: "Special damages which are the natural but not the necessary result of the injury complained of, must be specifically pleaded. Such injuries do not necessarily result from the defendant's wrongful act, but flow from it as a natural and proximate consequence. Hence they must be specially alleged in order that the defendant may have notice thereof and be prepared to meet the same upon the trial." (5 Ency. of Pl. & Pr. 719.) As shown by these authorities, it is not enough that the resulting damage to plaintiff's left eye followed, in point of time, the injury to his right eye; nor is it sufficient that such damage was the natural re-

sult of the injury. In order to admit proof of such damage, without specially pleading it, it was necessary for plaintiff to show that such damage was the *necessary* result of the injury to his right eye, and this he failed to do.

(b) But it is said: "The court takes judicial notice of the laws of nature (section 7888, Revised Codes), and will take judicial notice of the fact that the destruction of the sight of one eye impairs the powers of vision, and that there is such a relationship between the eyes that the destruction of the sight of one necessarily affects to some extent the use of the other." Of course, this court takes judicial notice of the laws of nature, and, this being the major premise of counsel's argument, we fully agree with it; and in a general way we may likewise agree with the minor premise, that the destruction of the sight of one eye impairs the power of vision. But we do not agree with the logic which deduces from these premises the conclusion that the destruction of the sight of one eye necessarily affects, to some extent, the use of the other, if by this is meant,—as it must be intended to mean,—that the destruction of the sight of one eye necessarily injuriously affects the sight of the other. Whether such result would follow we imagine would depend upon the nature and extent of the injury and the character of treatment accorded it.

In another case cited by respondent (*Brooklyn Heights R. Co. v. MacLaury*, 107 Fed. 644, 46 C. C. A. 523), the circuit court of appeals was considering the admissibility of evidence of impaired eyesight, under a complaint which alleged that: "The plaintiff was hurled forward with such force as to bruise her right knee, sprain, contuse, and shock the right knee-joint, wrench her right arm, and otherwise seriously and grievously injure her, and to receive a severe and violent shock to her system, by reason whereof she * * * is, as she believes, permanently injured, so that she will never be as strong or able to pursue her vocation as heretofore." The trial court admitted the evidence and refused a motion to strike it out, after plaintiff had failed to introduce evidence to show the causal connection be-

tween the injury complained of and the impaired eyesight, and, speaking of the court's ruling, the court of appeals said: "Inasmuch as neither the court nor the jury can assume without proof that a blow on the knee, elbow, or chest, or a nervous shock ensuing thereon, may be expected to produce an impairment of the eyesight such as plaintiff had described, it was error to deny this motion." We agree with that conclusion and think it directly applicable to the phase of this case now under consideration. Two courses were open to the plaintiff here: First, he could have offered the testimony of competent witnesses to show that the resulting damage to his left eye was the necessary consequence of the injury to his right eye, if such is the fact; or, second, by specially pleading the facts of such resulting damage, he could have proven it, if it was the natural and proximate consequence of the injury to his right eye. He did not pursue either of these courses, and erred in the course he did pursue.

(c) But counsel for respondent further say: "The allegation, however, appears in the pleading in this case that on account of the injury the respondent suffered excruciating pain. This averment is broad enough so that proof, such as is here presented, as to the other eye, would be admissible." For the purposes of this appeal we may admit, without deciding, that the allegation that plaintiff suffered excruciating pain is sufficient to admit evidence of *pain* in the other eye; but there is not any evidence of that character in this record. The plaintiff testified: "It [the left eye] never pains particularly, only if I read a little, why, my eyes begin to water. * * * My eyes would ache in the sunlight." The purpose of this evidence, then, was not to show pain in the left eye, as a direct result or proximate consequence of the injury to the right eye, but was to show a generally weakened condition or general impairment of the left eye, and this he could not do under the case as made, as we have heretofore determined.

2. Over the objection of defendants, the plaintiff testified that, because his left eye was so weak he could not stand any

bright light, he was not able to do any work for a year after the injury. This evidence was objected to on the ground that there is not any allegation in the complaint of loss of time. Upon the question of the right of the plaintiff to recover for loss of time, without specially alleging the fact of such loss, the authorities are not altogether agreed. If the evidence in this case had been restricted to the loss of time occasioned directly by the injury to the right eye, the trial court's ruling could be sustained by many authorities; but here the loss of time appears, not as the direct result of the injury complained of, but as the result of a resulting injury, viz., the impairment of the left eye, and, since evidence of such impairment was incompetent under the case as made, it would seem to follow that evidence of the result of such impairment was likewise incompetent.

Again turning to the authorities cited by respondent, we find in *Wilbur v. Southwest Missouri El. Ry. Co.*, 110 Mo. App. 689, 85 S. W. 671, the court, in considering the question of the admissibility of evidence tending to show loss of time and earnings, saying: "It is the rule that damages of this kind, not being such as necessarily and naturally result from injury to the person, must be specially pleaded in the petition." And the leading case cited is *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 462, 16 S. W. 849, 10 L. R. A. 36. In the *Mellor Case* the plaintiff alleged that he "was made sick and sore, suffered great pain of body and mind, and was permanently crippled, disfigured, and disabled." Speaking on the question of loss of earnings, the court said: "Next, the instruction on the measure of recovery is challenged as erroneous because it mentions 'loss of earnings' as an element of damage; whereas, the petition makes no claim for compensation on account thereof. Loss of earnings is a kind of injury which is not regarded as a necessary consequence of such acts as are complained of here, and therefore is not embraced within plaintiff's general allegations of damage. It is one sort of special damages, and consequently must, in some wise, be counted upon to constitute a basis for evidence on the subject. The purpose of this rule is to prevent surprise, and to inform

defendant of the exact scope of plaintiff's demand." In 5 Encyclopedia of Pleading and Practice, above, at page 758, it is said: "In order to recover for loss of time resulting from personal injuries, the same must, as a general rule, be claimed as special damages."

Many of the cases cited by counsel for respondent deal with complaints which contain general allegations of injury. Typical of these is *Terre Haute & I. R. Co. v. Pritchard*, 37 Ind. App. 420, 76 N. E. 1070, in which it is said: "The complaint alleges that the plaintiff was greatly bruised about the head, face and body. This allegation was sufficient to authorize the introduction of evidence of particular injuries to the head and face, including that to the senses of sight and hearing." In the absence of a special demurrer, or a motion to make more specific, or a demand for a bill of particulars, we think the complaint in that case was sufficient to warrant the proof made. In speaking of similar general allegations, the court of appeals of Missouri, in *Wilbur v. Southwest Missouri El. Co.*, above, said: "It is not to be inferred defendant would not have been entitled to a more definite statement had he, by proper motion, sought to be informed of the nature of the injuries claimed. Without filing such motion, defendant answered, putting in issue the fact of any injury. In this condition of the record the objections, made for the first time at the trial, came too late." But all such cases are beside the question now under consideration. In this present instance there is not any general allegation with respect to the injury complained of. On the contrary, the plaintiff particularized the injury as the destruction of the sight of his right eye, and we think the rule announced in *Rudomin v. Interurban St. Ry. Co.*, 111 App. Div. 548, 98 N. Y. Supp. 506, also cited by counsel for respondent, is correct, viz.: "The rule now seems to be that under a general allegation of bodily injuries the plaintiff may prove any injury to his person, and, if the defendant desires that they should be more definitely stated, then it should move to have them made more specific or for a bill of particulars; but, where the complaint specifies the injuries received, then

proof cannot be given of any other injuries, unless they necessarily and immediately flow from those named."

In *Brooklyn Heights R. Co. v. MacLaury*, above, the court, after determining that incompetent evidence had been permitted to go before the jury, concluded its opinion as follows: "We cannot tell from their verdict whether or not the jury gave anything for the impaired eyesight, and cannot say that the damages were not increased by allowing the plaintiff's testimony as to her inability to read, write, and sew to remain in the case." Likewise, here, we cannot tell whether the jury allowed anything for damages for the resulting injury to plaintiff's left eye or the consequent loss of time; and, since these elements may have been considered by the jury, and presumably were, and may have led to increasing the amount of the verdict over what would have been allowed otherwise, we have no alternative but to reverse the judgment and order, and remand the cause for a new trial, which is accordingly done.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE EX REL. JONES, RELATOR, v. FOSTER, DEFENDANT.

(No. 2,774.)

(Submitted October 30, 1909. Decided November 8, 1909.)

[104 Pac. 860.]

*Quo Warranto—Constitutional Law—Clerks of District Court—
Term of Office—Elections—Tie Vote—Vacancy—Power of
County Commissioners to Fill.*

Judges and Clerks of District Courts—Terms of Office—Constitutional Limitation.

1. Section 12, Article VIII of the Constitution provides, *inter alia*, that the term of office of district judge shall be four years, "except that the district judges first elected shall hold their offices only until the general election in the year 1892, and until their successors are

elected and qualified." Section 18, of the same Article, declares that the clerk of the district shall be elected at the same time and for the same term as the district judge. *Held*, on *quo warranto*, that under these provisions the terms of these judicial officers are strictly limited to four years, and that the words "and until their successors are elected and qualified" refer to those officers only who were first elected after the adoption of the Constitution, and have no application to those thereafter chosen.

Clerk of District Court—Term of Office—Elections—Tie Vote—Vacancy—Power of County Commissioners to Fill.

2. Under the rule stated in the above paragraph, a vacancy occurred, by operation of law, in the office of the clerk of the district court upon the expiration of the term of the then incumbent, where by reason of a tie vote the electors failed to choose his successor, which vacancy the board of county commissioners were authorized to fill by appointment, under section 457, Revised Codes.

ORIGINAL PROCEEDINGS in the nature of *quo warranto* by the state, on the relation of Lorin T. Jones, against Fred H. Foster. Judgment for relator.

Messrs. Hatthorn & Brown filed a brief in behalf of Relator; *Mr. Fred H. Hatthorn* argued the cause orally.

In behalf of Respondent there was a brief and oral argument by *Messrs. Gunn & Rasch*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an original proceeding in the nature of *quo warranto* to determine the title to the office of clerk of the district court in and for Yellowstone county. The relator is, and was at the times mentioned hereinafter, an elector residing in Yellowstone county. He was voted for as the regular candidate of the Republican party at the general election held on November 3, 1908, to succeed Fred H. Foster, who had been elected at the general election held on November 8, 1904, for the term of four years. Nat G. Carwile was the candidate of the Democratic party. Upon a canvass of the vote by the commissioners of the county, on November 10, 1908, it was found that the relator had received a total of 1,584 votes as against a total of 1,574 received by Carwile, and thereupon there was issued to him a certificate

showing that he had been elected. He in due time qualified to assume the office on the first Monday in January, 1909, the time at which Foster's term expired, by taking his official oath and filing the bond required by law. In the meantime Carwile instituted a contest, claiming that, notwithstanding it appeared from the face of the returns that the relator had received the highest number of votes, he himself had, in fact, received the highest number, and was entitled to the office. Upon a trial in the district court, it was found that the relator had received a total of 1,575 votes, and that Carwile had received a total of 1,577. Judgment was thereupon entered declaring the latter entitled to the office. Upon appeal to this court, it was found and adjudged that each candidate had received a total of 1,577 votes, and hence that neither had been elected. The district court was directed to vacate its judgment and to render judgment in accordance with the conclusion announced by this court. (*Carwile v. Jones*, 38 Mont. 590, 101 Pa. 153.) Judgment was accordingly entered by that court on July 6, 1909. During the litigation Foster continued to hold the office and to perform the duties pertaining to it. On July 7 the commissioners of the county, having concluded that the office had become vacant by reason of the tie vote and the expiration of the term for which Foster had been elected, under the authority vested in them by the statute in such cases (Revised Codes, sec. 457), appointed the relator to serve as clerk until the next general election, the appointment to take effect immediately, and issued to him a certificate. Having duly qualified as required by law, on July 9 he attempted to assume the office, but was prevented from so doing by Foster, who claimed that he was entitled to hold it until his successor had been regularly elected by the people at a general election. The complaint, alleging the foregoing facts, demands judgment that the relator is entitled to the office by virtue of his appointment, together with the salary appertaining thereto, since the date of his appointment, and for such further relief as to the court may seem proper. The defendant made appearance in this court by general demurrer. The question

submitted for decision is whether or not, when an election to fill this office results in a tie vote, there is a vacancy in the office, and the commissioners of the county are vested with the power under the statute and the provisions of the constitution applicable to fill it by appointment.

Section 457, *supra*, declares, among other things: "In case of a tie vote for clerk of the district court, county attorney, or for any county officer except county commissioner, and for any township officer, the board of county commissioners must appoint some eligible person, as in case of other vacancies in such offices; and in case of a tie vote for county commissioner, the district judge of the county must appoint an eligible person to fill the office, as in other cases of vacancy." In adopting this enactment, the legislature assumed that under the provisions of the Constitution the term of any one of the various officers enumerated expires, and the office becomes vacant, whenever an election results in a tie vote between the candidates for that office, and that some provision was necessary in order to fill the office. In order, also, that the office might not be without a temporary incumbent, or *locum tenens*, to serve the convenience of the public in the meantime and until an appointment could be made or an election held, it provided further that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." (Revised Codes, sec. 355.) It is not important here to inquire into the validity of the latter provision. For present purposes we shall assume that the legislature had the power to enact it. Nor shall we question the correctness of the rule, though there is some diversity in the decisions of the courts upon the subject (Mechem's Public Officers, secs. 396, 397; 1 Smith's Modern Law of Municipal Corporations, sec. 169; McCrary on Elections, 4th ed., sec. 349), that where there is no such statutory provision, and the Constitution contains no express or implied prohibition, the incumbent may lawfully continue as *locum tenens* to perform the duties of the office until a successor has been elected or appointed in the manner provided by law. The right of Foster to hold this office

and discharge the duties attached to it prior to the appointment of the relator is not involved in this inquiry. It may be suggested, however, that for the protection of the public he should be regarded as a *de facto* officer and his acts be upheld on this ground.

When there is a clause in the Constitution providing that an officer shall hold for a definite term and until his successor is elected and qualified, the conclusion seems inevitable that, if for any reason the people fail to elect his successor, there is no vacancy, and he is entitled to hold over. This court, in *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 299, so held with reference to the office of county superintendent of schools, construing the clause referred to to mean that the term continues until the people have chosen the successor in the usual way. Counsel for defendant cite this case with confidence in support of their contention that section 420 of the Revised Codes, declaring that upon the happening of certain events, before the expiration of the term, vacancies must be deemed to exist, is exclusive. This contention will be noticed hereafter. The conclusion we have reached upon the question involved here is predicated upon the construction which we think should be given to the provisions of the Constitution applicable. These are the following:

Section 12, Article VIII: "The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified. * * *

Section 18, Article VIII: "There shall be a clerk of the district court in each county, who shall be elected by the electors of his county. The clerk shall be elected at the same time and for the same term as the district judge. * * *

Under the second of these provisions the term of office of the clerk and the time at which he must be elected are made dependent upon the term of office of the district judges and the

time at which they must be elected. Hence the rule applicable to the latter applies to the former. That it was the intention of the convention to limit the term of office of district judges to four years seems clear, not only from the language employed in section 12, but from the other provisions applicable to all other judicial officers, including even justices of the peace. In adopting it the convention had three purposes in view: (1) to provide for the division of the state into districts; (2) to provide for district judges and to fix their term of office; and (3), by way of exception, to fix the term of office of those first elected, so that they would hold until the general election in 1892, and until their successors should be elected and qualified. But for the exception those first elected would also have held for the term of four years. The purpose of it was to so adjust the term of those first elected that thereafter the election would fall regularly upon presidential years, and be uniform throughout the state. This purpose is manifested by the sixth paragraph of Ordinance 2, wherein provision is made for the election of the first judges, and declaring that their term should expire on the first Monday in January, 1893, "except as otherwise provided." This latter provision, in declaring that the term of the judges first elected should expire on the first Monday in January, 1893, is apparently inconsistent with the exception clause of section 12, *supra*, but this condition does not affect the question at issue here. The ordinance became obsolete after the first election; its purpose being merely to provide for the election and to prescribe the terms of office of all officers elected to serve first after the state was admitted into the Union.

The contention of counsel for defendant is that the clause "and until their successors are elected and qualified," in section 12, *supra*, is to be read with the first clause of the section, and that it must follow under the rule stated in *State ex rel. Chenoweth v. Acton, supra*, that the term of office of district judges, and hence of clerks of district courts, is not limited strictly to the period of four years. This cannot be so, because the first clause containing the general provision refers to the judge of

each district distributively and in the singular number, whereas the first part of the exception clause refers to the judges collectively in the plural number, while the demonstrative pronoun "their" in the last clause takes the same number. In the use of the demonstrative "their," the convention evidently had in mind the judges first elected, and no others. Taking the language just as it stands and noting the grammatical construction of the section, giving to each clause its logical sequence and manifest reference, it is clear that the last clause forms a part of the exception, and does not otherwise limit or qualify the general clause. To avoid the conclusion, counsel invoke the familiar rule that the office and effect of an exception is to take out of an enactment something which otherwise would be a part of the subject matter of it, and contend that the exception as to the judges first elected is manifestly intended to apply to the term of office alone, and not to the right to hold over, because otherwise there is nothing in the general clause on the subject of holding over upon which the exception can operate; and hence that, by construing the last clause to apply only to the judges first elected, the exception is made to create a new right not otherwise provided for, and one which would have no existence but for the exception. This we do not think is the result. The general clause, standing alone, would have made the term of all judges four years. The exception merely takes out of this general provision those first elected, thus creating a separate class for a temporary purpose only, and fixing the term of office, which would not otherwise be so fixed as to effect this purpose. We are fortified in our view of the section by the provisions fixing the term of other judicial officers. Section 7 of the same Article declares that the term of the justices of this court shall be six years, except as otherwise provided. In a following section the terms of those first elected are fixed, and it is declared that each shall hold his office until his successor is elected and qualified. In the same way, in section 9, the term of office of the clerk of this court is fixed at six years, with the same exception as to the one first elected embodying the clause authorizing him to

hold over until his successor should be elected and qualified. The same provision is made for the office of county attorney in section 19, which fixes the term for two years, and makes the same exception. The term of justices of the peace is fixed at two years without the exception. (Section 20.) The only provision fixing the term of those first elected is found in the ninth paragraph of Ordinance 2, where it is provided that the term should extend to the first Monday in January, 1893. On the other hand, as to all other officers, except county commissioners whose terms are the subject of a special provision, it is provided that they shall hold until their successors are elected and qualified. The provision regulating the term of state executive officers in this respect is found in section 1 of Article VII; that applying to the term of all county officers is found in section 5 of Article XVI. There is thus manifested by the convention the intention that the terms of the officers of the state and county governments shall continue until the election of their successors by the people at general elections, as held in *State ex rel. Chenoweth v. Acton, supra*; whereas, those of judicial officers shall end at the expiration of a definitely fixed period. Why this course should have been pursued, or why the exception should have been made as to those judicial officers first elected, is not clear; but that it was the purpose cannot be questioned, when all the provisions touching both classes of officers are examined and construed according to the rule prescribed by the Constitution itself (section 29, Article III), viz., that "the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

There are no other provisions than those cited above pertinent to the subject now under consideration. Hence the provisions fixing the terms of judicial officers must be held to be exclusive, with the result that vacancies occur by operation of law upon the expiration of the terms designated; and this is so, even if the people have failed to elect their successors." To this situation section 420, Revised Codes, *supra*, can have no application, for two reasons: In the first place, by its own terms it refers only

to vacancies occurring "before the expiration of the term" upon the happening of any one of the events enumerated. It does not, therefore, contemplate a vacancy which may occur for any other cause. In the second place, if it could be construed to include all causes by reason of which vacancies may occur, it would impliedly exclude vacancies occurring upon the expiration of the term when there has been a failure by the people to elect a successor, with the result that the incumbent, who should go out, would hold over notwithstanding the implied prohibition in the Constitution.

In *State ex rel. Chenoweth v. Acton*, section 457, *supra*, was declared invalid in so far as it was intended to apply to those officers who are authorized by the Constitution to hold until their successors elected by the people are qualified to succeed them; and this holding was correct. But, in so far as the opinion contains *dicta* which may be construed to the effect that it is invalid as applied to the office of the clerk of the district court, it must be regarded as suggestive merely, and not controlling. In construing section 420 the court accepted the view adopted by the supreme court of California upon an identical provision in the Code of that state in *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. 261, and other cases. In *People ex rel. Sweet v. Ward*, 107 Cal. 236, 40 Pac. 538, however, the same court held that when the successor to the office of district attorney had been elected and qualified, but died before the time arrived at which he might assume the office, there occurred a vacancy not contemplated by the statute. So it was held, in *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582, that, where one elected to the office of sheriff failed to qualify by taking the oath and filing the bond required by law, the office became vacant upon the date upon which he might have taken it, and therefore that the board of supervisors had properly appointed a person to fill the vacancy. To the same effect is the holding, in *Campbell v. Board of Supervisors*, 7 Cal. App. 155, 93 Pac. 1061, where the election for the office of district attorney had been declared void. It is to be noted that in each of these cases the decision rests upon the

meaning given to the term "incumbent"; the court holding that the word is broad enough in its meaning to include a person who had been duly elected, but for any reason had failed to take the office. To the same effect is the holding in *People ex rel. Mattison v. Nye*, 9 Cal. App. 148, 98 Pac. 241, where the term "incumbent" was held to include one who had died after the election, but before notice of the result. In *People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 70 Pac. 918, the same court, without referring to the statute, held that under the section of the Constitution fixing the term of office of judges of the superior court at six years, a vacancy occurred at the expiration of the term, though a successor had not been elected. In our opinion, these cases virtually overrule the case of *Rosborough v. Boardman* and the other cases cited in the discussion in *State ex rel. Chenoweth v. Acton*, and render them of doubtful authority.

Since a vacancy, within the meaning of the Constitution, occurred at the expiration of Foster's term, by reason of the tie vote and the consequent failure of the people to elect, the appointment of the relator was properly made, and he became, upon his qualification pursuant thereto, entitled to the office and salary and emoluments attached to it. The Constitution (section 34, Article VIII) vests in the board of county commissioners the power to appoint in such cases, and section 457, Revised Codes, *supra*, is, in so far as concerns this office, a valid exercise of power by the legislature to render the constitutional provision effective.

The result is that the demurrer must be overruled and judgment entered that the relator is entitled to the office and its salary and emoluments from the date of qualification under his appointment. It is so ordered.

Judgment for relator.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied, December 7, 1909.

McKENZIE, APPELLANT, v. DORAN ET AL., RESPONDENTS.

(No. 2,706.)

(Submitted October 28, 1909. Decided November 10, 1909.)

[104 Pac. 677.]

Justices of the Peace—Jurisdiction—Slander.

1. Under section 66, Code of Civil Procedure, 1895, a justice of the peace court had jurisdiction of an action for slander, commenced prior to the amendment of said section (Laws 1907, p. 186), where the damages claimed did not exceed \$300.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by McKenzie against John Doran, a justice of the peace, and the sureties on his official bond. Judgment for defendants, and plaintiff appeals. Affirmed.

There was a brief by Mr. N. H. Rotering, Mr. L. P. Donovan, and Mr. A. B. Melzner, for Appellant; Mr. Rotering argued the cause orally.

In the brief the following authorities were cited: *Engelking v. Von Wamel*, 26 Tex. 469; *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, 45 N. W. 522, 8 L. R. A. 420; *Mulford v. Clew-ell*, 21 Ohio St. 190; *Peterson v. Knoble*, 35 Wis. 80; *Wagner v. Lathers*, 26 Wis. 436; *Birkhead v. Ward*, 35 Pa. Super. Ct. Rep. 235, 24 Cyc. 449.

Mr. John G. Brown, and Mr. H. K. Jones, filed a brief in behalf of Respondents, and both argued the cause orally.

New York, with similar statutes to those of our own state, has expressly held that libel and slander are included in personal injury. (*Morse v. Press Co.*, 63 App. Div. 61, 71 N. Y. Supp. 348; *Lasche v. Dearing*, 23 Misc. Rep. 722, 53 N. Y. Supp. 58; *Cregin v. Railway Co.*, 75 N. Y. 192, 31 Am. Rep. 459.) We would also call attention to a similar construction in Wisconsin.

(*Wightman v. Devere*, 33 Wis. 570.) And upon the construction of a statute very similar to ours, in a very well-reasoned case, see *Johnson v. Bradstreets Co.*, 87 Ga. 79, 13 S. E. 250.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the plaintiff against John Doran, a justice of the peace of Silver Bow county, and the sureties on his official bond. The *gravamen* of the complaint is that in 1905 the defendant Doran, as such justice of the peace, wrongfully assumed to entertain and exercise jurisdiction of an action instituted in his court by one Lewis Larson against this plaintiff, McKenzie, to recover \$300 for slander. It is charged that such proceedings were had and done in that case that a judgment was rendered in favor of Larson and execution issued thereon and property of McKenzie seized by the sheriff of Silver Bow county, by reason whereof it is now said this plaintiff was damaged in the sum of \$353.95. To this complaint a demurrer was interposed and sustained, and the plaintiff, electing to stand upon her complaint, suffered judgment to be rendered against her, from which judgment she appealed to this court.

We may waive aside any other questions and accept the declaration of counsel for appellant in their brief that "this appeal involves but one important question, * * * to-wit: Whether the justice of the peace had jurisdiction to try an action for slander." At the time the case of *Larson v. McKenzie* was commenced, the Codes of 1895 were in force and controlling. Those Codes give a comprehensive definition of judicial remedies. (Code Civ. Proc., sec. 3469.) These remedies are divided into actions and special proceedings. (Sec. 3470.) Actions are civil or criminal. (Sec. 3473.) Every civil action arises out of an obligation or an injury. (Sec. 3474.) Injuries are divided into two classes: (a) injuries to the person; (b) injuries to property. (Sec. 3476.) "An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it." (Sec. 3477.) "Every

other injury is an injury to the person." (Sec. 3478.) Since slander is an injury, but not an injury to property, it follows that it is an injury to the person. Section 66 of the same Code provides: "The justices' courts have civil jurisdiction: * * * (2) In actions for damages for injury to the person * * * if the damages claimed do not exceed three hundred dollars." The language in section 66 is just as broad as the language employed in section 3478, and we cannot find any reason for saying that the former does not comprehend everything included in the latter; and, if it does, a justice of the peace court in 1905 had jurisdiction of a civil action brought to recover damages for slander if the damages claimed did not exceed \$300.

At common law the rights of persons were absolute and relative. The absolute rights were (a) right of personal security; (b) right of personal liberty; and (c) right of private property, and the wrongs or injuries affecting the person were given a corresponding classification. "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations." (3 Hammond's Blackstone's Commentaries, p. 158.) "Lastly, injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation." (*Id.*, p. 162.) And for such slander the injured party had an action for damages. Cooley makes a like classification, and, speaking of the right of personal security, says: "In the classification above made the first class embraces the rights which pertain to the person. In this are included the right of life, the right to immunity from attacks and injuries, and the right equally with others similarly circumstanced to control one's own action. In all enlightened countries the same class would also include the right to the benefit of such reputation as one's conduct has entitled him to, and the enjoyment of all such civil rights as are conceded by the law" (Cooley on Torts, 2d ed., p. 24); and slander is treated as a violation of the right of security to reputation. Finally our own Code, in treating of the subject "Personal Rights," provides

that every person has the right of protection from defamation effected by libel or slander. (Civil Code, secs. 30, 31.)

It seems to us, therefore, that in conferring upon the justice of the peace court jurisdiction in an action for damages for injury to the person, where the amount claimed did not exceed \$300, the legislature intended to use the phrase "injury to the person," in the Codes of 1895, in the same sense that it was understood at common law; and thereby jurisdiction was conferred upon such court in an action for damages for slander, if the damages claimed did not exceed \$300. In this conclusion we are strongly fortified by the subsequent action of the legislature itself. By an Act approved March 4, 1907 (Laws 1907, p. 186), subdivision 2 of section 66 of the Code of Civil Procedure of 1895 above was amended by the addition of the following: "Provided, that in actions for false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, bastardy, abduction and alienation of affections, the justice of the peace shall not have jurisdiction." If the justice's court did not have jurisdiction of any action for slander prior to 1907, this action on the part of the legislature was wholly uncalled for; and the fact that the legislature in 1907 deemed it necessary to specifically deny to justices' courts such jurisdiction thereafter is to be taken as a legislative construction of the phrase "injury to the person," as theretofore employed in the Code, to include slander, and the legislature, deeming it unwise that justices' courts should be clothed with authority to deal with a subject presenting so many difficulties, wisely took such jurisdiction away from those courts. Authorities may be found which construe the phrase "injury to the person" to mean only such injury as would support an action for trespass *vi et armis*; and there are some provisions in the Codes of 1895 which seem to make a distinction between injuries to the person and injuries to the character, but the conclusion we have reached seems to us the correct one.

Since in the case of *Larson v. McKenzie* the damages claimed did not exceed \$300, and the action was commenced prior to the

amendment of 1907, the justice of the peace court at that time had jurisdiction, and the complaint in this action does not state a cause of action.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

KELLY, APPELLANT, v. ELLIS ET AL., RESPONDENTS.

(No. 2,709.)

(Submitted October 29, 1909. Decided November 12, 1909.)

[104 Pac. 873.]

*Deceit—Contracts in Writing Supersede Oral Negotiations—
Exception to Rule—Pleadings—Complaint—Insufficiency.*

Contracts in Writing Supersede Oral Negotiations—Exception to Rule.

1. A contract in writing supersedes all the prior or contemporaneous oral negotiations and stipulations relating to the subject matter of the agreement between the contracting parties; and therefore a party to it will not be heard to complain that there were other stipulations, unless they pertain to some collateral matter which operated as an inducement to his entering into the principal agreement.

Same—Complaint—Insufficiency.

2. *Held*, under the rule above, that plaintiff's complaint, in an action for damages for deceit, alleging, in substance, that he had entered into an oral contract the provisions of which were subsequently reduced to writing, to sell, and sold, to defendant company his sheep ranch, etc.; that in the oral negotiations ending in the sale it was understood and agreed that after such sale defendant would make him manager of its sheep business; that the memorandum of sale did not contain any reference to his employment as manager, but that upon assurance by the president of defendant that this provision of the oral agreement would be carried out, he signed same; that such promise was the "most important condition of the agreement," and that but for such promise he would not have sold his property to defendant, did not state a cause of action and that a demurrer thereto was properly sustained.

Appeal from District Court, Sweet Grass County; Frank Henry, Judge.

ACTION by J. N. Kelly against W. Dixon Ellis and the Briggs & Ellis Company. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Hartman & Hartman, and *Mr. H. J. Miller*, filed a brief in behalf of Appellant; *Mr. Walter Hartman* argued the cause orally.

That the defendants willfully deceived the plaintiff with reference to his appointment as manager, with the intent to induce him to alter his position to his injury seems clear. If so, they are liable for any damage which he thereby suffered. (Rev. Codes, secs. 5072, 5073; *Cockrill v. Hall*, 65 Cal. 326, 4 Pac. 33; *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321.) The principle underlying the case was announced by this court in *Sathre v. Rolf*, 31 Mont. 85, 77 Pac. 431. (See, also, Bishop on Contracts, secs. 667, 668.)

It is apparent from the allegations of the complaint that rescission by plaintiff is impossible, for the reason that the entire *status* of both parties has changed, much of the personal property of plaintiff has been sold and disposed of, and it is impossible to put both parties in *statu quo*. (*Clark v. American D. & M. Co.*, 28 Mont. 468, 72 Pac. 978; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161.) Where the rights of others have intervened and the circumstances of the parties have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his action at law for damages for the fraud. (*Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.)

If the action is properly based upon the principles of the sections of the Revised Codes, *supra*, then the statute of frauds cannot be appealed to, for the suit is not upon the contract but for damages for fraud. If it be held to be upon the oral contract executed and performed by plaintiff, then the statute of frauds furnishes no defense to an action upon the contract where the contract was executed by the plaintiff, and the defendant has received the conveyance of the land upon the faith of his

promise; for the statute will not avail him even if his promise had originally been within it. A party who receives a grant of land upon his promise to pay for it cannot avoid payment by showing that his promise was not in writing. (*Brackett v. Evans*, 1 Cush. 79, citing *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286; *Baxter v. Gay*, 14 Conn. 119; *Gray v. Hill*, Ryan & M. 420; Addison on Contracts, 94.) When the title has passed the grantee must pay the price agreed upon, and the rule holds good when the consideration for the conveyance is not money but a promise of the grantee. An action will lie for the breach of such promise if it is not itself within the statute. (20 Cyc. 294, 295; *Chapman v. Allen*, 1 Kirby (Conn.), 399, 1 Am. Dec. 24; *Trayer v. Reeder*, 45 Iowa, 272; *Atchison etc. R. Co. v. English*, 38 Kan. 110, 16 Pac. 82; *Preble v. Baldwin*, 6 Cush. 549; *Brackett v. Evans*, 1 Cush. 79.) If an agreement which was unenforceable, because within the statute, has been performed, an action will ordinarily lie for the refusal to perform a promise given in consideration thereof or in connection therewith. (20 Cyc. 293; *Ives v. Gilbert*, 1 Root (Conn.), 89, 1 Am. Dec. 35; *Straughan v. Indianapolis etc. R. Co.*, 38 Ind. 185; *Aiken v. Nogle*, 47 Kan. 96, 27 Pac. 825; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116, 32 Am. Dec. 152; *Hurley v. Donovan*, 182 Mass. 64, 64 N. E. 685; *Remington v. Palmer*, 62 N. Y. 31; *Bridge Co. v. Brewing Co.*, 90 Fed. 189.) The alleged contract to make Kelly manager for the remainder of his active business life is not an agreement to be performed within one year so as to be void under the statute of frauds; for an oral agreement to continue to do some particular act for an indefinite period of time is not within the statute, if by the fair import of its terms either party may terminate it any time whether after or before the expiration of the year. (20 Cyc. 203; *Atchison etc. R. Co. v. English*, *supra*.)

There was a brief on behalf of Respondents, by Mr. John A. Luce, and Mr. John E. Barbour, and oral argument by Mr. Luce.

The written contract superseded all oral negotiations. (Rev. Codes, sec. 5018; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279;

Armington v. Stelle, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Riddell v. Peck-Williamson Co.*, 27 Mont. 44, 69 Pac. 241; *Easterly v. Jackson*, 29 Mont. 496, 75 Pac. 357; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Bradford Investment Co. v. Joost*, 117 Cal. 211, 48 Pac. 1083.) It will be seen from the complaint that the oral agreement which was part of the original contract, afterward reduced to writing, was not in any way upon a collateral matter, but related directly to the subject of the contract and, in fact, was the principal subject of the contract and falls squarely within the rule laid down by this court in the cases above cited. (See, also, *Seitz v. Brewers Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Gillett v. Clark*, 6 Mont. 190, 9 Pac. 823; *Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30; *Nelson v. Spears*, 16 Mont. 351, 40 Pac. 786.)

Where the terms of an agreement have been reduced to writing, it is to be considered as containing all its terms. (Rev. Codes, sec. 7873; *Gaffney Merc. Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561; *Guy v. Bibend*, 41 Cal. 322; *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; *Cocke v. Blackburn*, 58 Miss. 537; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; *Englehorn v. Reitlinger*, 12 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820; *Jackowski v. Illinois Steel Co.*, 103 Wis. 448, 79 N. W. 757; *Caldwell v. Perkins*, 93 Wis. 89, 67 N. W. 29.)

A written contract cannot be reformed so as to insert in it a provision which was omitted with the consent of the party asking reformation, although the consent was given in reliance upon an oral promise of the other party that such omission should make no difference. (*Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *Eighmie v. Taylor*, 98 N. Y. 288, 294; *Irvin v. Irvin*, 142 Pa. 271, 21 Atl. 816; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Braun v. Wisconsin Rendering Co.*, 92 Wis. 247, 66 N. W. 196.)

Even though a reformation of the contract were asked,—and it is only in this way that the plaintiff could recover, if at all,—a court of equity would not reform the contract because the plaintiff was not without fault. Where a party has the means of observation or knowledge, the doctrine of *caveat emptor* applies, and omitted stipulations will not be supplied in the contract by reformation. (*Manlove v. Fairbanks*, 45 Wis. 415; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775; *Hunt v. Hardwick*, 68 Ga. 100; *Floars v. Aetna Life Ins. Co.*, 144 N. C. 232, 56 S. E. 915, 11 L. R. A., n. s., 357, 359; *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A., n. s., 1211.)

Respondents contend that for the claimed fraud as alleged in the complaint, the only relief open to the appellant was rescission of the contract. No rescission has ever been attempted to be made by the plaintiff and the time for rescission has long since passed. The plaintiff's duty was clear. If the consent to the written contract was obtained by fraud, immediately upon his ascertaining that the defendants had no intention of complying with the contract to make him manager, he should have rescinded the whole contract. (See *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804; *Thomas v. McCue*, 19 Wash. 289, 53 Pac. 161; *Richardson v. Lowe*, 149 Fed. 625; *McDonough v. Williams*, 77 Ark. 261, 92 S. W. 783, 8 L. R. A., n. s., 452; *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201, 31 Pac. 290; *Scott v. Walton*, 32 Or. 460, 52 Pac. 180.) Under the authorities above cited, the plaintiff has waived any rights which he had by his own neglect and misconduct. (*City of Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action is quite lengthy, and a sufficient summary of it may be made to fairly present the controversy without setting it forth in full. It appears from the complaint that the Briggs & Ellis Company is a New Jersey corporation

engaged in the sheep business in Montana, with its principal place of business in Sweet Grass county; that the defendant Ellis is president, general manager, and principal stockholder of the company, and had the authority to contract for and on behalf of the company; that a local manager was employed, who resided in Sweet Grass county; that in April, 1906, James Vestal, who owned 351 shares of the capital stock of the Briggs & Ellis Company, was such local manager, but was about to retire from that position; that at that time the plaintiff was receiver of the United States land office at Bozeman, having an income of \$3,000 per year, with about one year of his term then to serve; that at that time the plaintiff was also engaged in the sheep business in Sweet Grass county; that he owned about 2,700 acres of land, which was almost surrounded by the lands of the Briggs & Ellis Company; that he ran about 2,500 head of sheep, and had all necessary personal property to successfully operate his plant, and was a man of wide experience in the sheep business—all of which facts were known to the defendants. It is then alleged that on or about April 10, 1906, the plaintiff and defendants entered into an oral agreement which provided, on the part of Kelly: (1) That he should sell his lands, sheep, and other personal property in Sweet Grass county to the Briggs & Ellis Company; (2) that he should take 100 shares of the Vestal stock, in lieu of \$7,500, as a part payment; (3) that he should resign as receiver of the land office; and (4) that he should devote his time to the performance of the duties as local manager of the Briggs & Ellis Company in Sweet Grass county "for such time as his health, strength and age might permit him to be in active business." On the part of the defendants: (1) That they should pay Kelly for his lands \$15,000, and for his personal property \$12,994, as follows: \$6,558.55 in cash, the 100 shares of Vestal stock, the note of the Briggs & Ellis Company for \$4,553.39, and they should assume and pay certain indebtedness of Kelly; and (2) that Kelly should be local manager for the time mentioned above, and should be paid for

his services \$2,000 per year, and should be allowed his expenses and the living expenses of himself and wife.

The complaint then sets forth that on April 17 a memorandum in writing was prepared by the defendants (presumably intended to embody all the terms of the oral agreement), and presented to plaintiff for his signature; that such memorandum did not contain any reference whatever to the employment of plaintiff as local manager, and, because of such omission, plaintiff at first refused to sign the same; "that on such refusal said defendant W. Dixon Ellis then and there agreed with plaintiff that such omission should make no difference in the real contract between the parties; that neither he nor said defendant company had ever had a written contract with their manager in Sweet Grass county, and that they would put such employment on record in the minutes of their directors' meeting, and that if plaintiff would sign said memorandum, and would transfer his personal property and with his wife deed his real property in accordance with the terms of their oral agreement theretofore made, he, the said defendant W. Dixon Ellis, and his said company would make plaintiff the manager of said company upon the salary as agreed upon during all of the remainder of his active business life"; that plaintiff, relying upon the promise of the defendant Ellis, and believing that he was acting in good faith and not otherwise, signed the memorandum, and on April 18 he and his wife executed and delivered to the Briggs & Ellis Company a deed conveying the real estate, and also transferred to said company the personal property, and received the consideration first above mentioned; that plaintiff at once resigned as receiver of the land office, and presented himself to perform the duties of local manager for defendants; that the defendants refused to employ him, and refused to pay him any salary, or allow him anything for expenses or for the living expenses of himself and wife; that defendants so negligently managed their business during 1906 that it resulted in a loss, whereas by proper management it should have shown a profit. It is also alleged that the oral agreement to employ plaintiff as local manager was fraudulently made,

without any intention on the part of either of the defendants to keep or perform the same, and for the sole purpose of procuring the plaintiff to part with his property and to drive him out of the sheep business. It is then alleged that because of the agreement to make him local manager, plaintiff sold his real estate to the defendants for \$5,000 less than its real value, and his sheep for \$1,200 less than their real value; that if plaintiff had been made local manager, he would have conducted the business at a profit, and that his profit as a stockholder thereof, and his salary and living expenses, would have amounted to \$3,000 per annum. It is then charged that by reason of the fraudulent acts of the defendants, the plaintiff sold his property at much less than its real value; that he has been deprived of his sheep business, which theretofore had returned him a profit of \$2,500 per year; that he has lost his position as receiver of the land office and his prospects of reappointment to that office. It is also alleged that defendants went into possession of the property sold to them by the plaintiff, and have sold and otherwise disposed of a large amount of the personal property. The complaint concludes: "And plaintiff says that the said false and fraudulent conduct and promises of defendants, and particularly defendant W. Dixon Ellis, were calculated to and did deceive the plaintiff, and that by reason thereof plaintiff was and is damaged in the sum of \$25,000, no part of which has been paid. Wherefore, plaintiff demands judgment," etc.

The defendants interposed a demurrer, which was sustained, and plaintiff, electing to stand upon his complaint, suffered judgment to be rendered and entered against him and appealed to this court.

This is an action for damages for deceit, predicated upon section 5072, Revised Codes, which provides that "one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," and upon subdivision 4, section 5073, which reads as follows: "A deceit, within the meaning of the last section, is:

* * * (4) A promise made without any intention of per-

forming it." These Code provisions are merely declaratory of rules which were generally in force long before they were reduced to the form of statutes. The controversy precipitated by this appeal is whether these rules can be applied to the facts of this case. If the complaint had charged that the defendants entered into the written contract of April 17 without any intention of performing their part of it, or without any intention on their part of performing any one or more of the provisions therein made by them relating to a material matter, then, in either of those events, the plaintiff would show himself entitled to damages for the deceit. Upon this proposition the authorities are quite uniformly agreed. But there is not any complaint made here that defendants have not fully kept and performed all the terms of the written agreement by them to be kept and performed. The gist of the complaint is that they have not kept or performed the oral agreement to employ plaintiff as local manager, and that they never intended to keep that agreement when they made it. However, for the violation of that promise the statute stands as an insuperable barrier between plaintiff and any recovery, unless the promise to employ him was a matter collateral to the principal agreement.

Section 7873, Revised Codes, provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. * * * " There is not any attack made upon the validity of the written agreement; and, since it appears from the complaint that at the time the plaintiff signed the written contract upon April 17 he fully understood and appreciated that it did not contain any provision for his employment as local manager, but nevertheless voluntarily signed it, he will not be heard to say now that such writing does not

contain all the terms of the agreement for the sale of his real and personal property in Sweet Grass county, and he cannot bring himself within either of the exceptions noted in the statute above. However, the writing of April 17 only superseded all the oral negotiations and stipulations between the parties so far as such negotiations and stipulations related to the matter of their agreement. The Code so provides in unmistakable terms: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Revised Codes, sec. 5018.) It did not necessarily supersede all their prior or contemporaneous negotiations; and, if the defendants by fraud or deceit, with respect to some collateral matter, induced the plaintiff to sign the writing, then he might be heard to complain.

In *Seitz v. Brewer's Refrigerating M. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, the court said: "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." That case is cited by this court in *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115, where, after reciting the sections of the Code above, it is said: "The statutory provisions cited are but declaratory of the common-law rule (1 Greenleaf on Evi-

dence, sec. 275), and recognize all the exceptions for which it provides. Among these is the case in which evidence may be received of the existence of an independent oral agreement not inconsistent with the stipulations of the written contract, and in respect of which the writing does not speak, but not to contradict, vary, add to, or qualify the absolute terms of the written contract. In such a case the independent oral agreement must have been upon some collateral matter, and must have operated as an inducement to the complaining party to enter into the agreement, whereas in the absence of it he would not have done so. To deny the admission of evidence in such a case, if relevant to the issues made by the pleadings, would be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary notwithstanding the fraud practiced upon him, by holding out to him the fraudulent inducement. We recognize this principle, and believe it to be in full accord, not only with the spirit of the statute, but also with adjudged cases (citing authorities). This principle, however, does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining party signed the instrument upon such promise."

The only remaining inquiry, then, is: Was the promise to employ plaintiff as local manager one of the essential terms of the oral contract itself, or was it only a collateral agreement made by the defendants as an inducement to the plaintiff to dispose of his property? This inquiry is fully answered by the complaint, which alleges that: "It was distinctly understood between this plaintiff and said defendant D. Dixon Ellis that the employment and appointment of plaintiff as manager of the business and properties of said defendant Briggs & Ellis Company, with headquarters in Sweet Grass county, for such time as his health, strength, and age might permit him to be in active business, at a salary of \$2,000 a year and expenses, and the living expenses of himself and wife, was the most important condition of said agreement, and the inducement, and only in-

ducement, to plaintiff's entering into such agreement, and, without such agreement for the employment of plaintiff as manager as aforesaid, that he would not enter into any agreement for the sale of his said properties, nor would he sell the same to said defendants, or either of them." While it is here said that such promise of employment was an inducement to plaintiff to sell his property, it is likewise said that such promise was "the most important condition of the agreement," and that but for that promise the plaintiff would not have sold his properties to the defendants. From these allegations, and others in the complaint, we are led to agree with the plaintiff that he considered the oral promise which provided for his employment as local manager as the most important portion of the agreement; or, as was said in *Armington v. Stelle*, above, it was of the very essence of their contract. This being so, to permit the plaintiff to assert any right under that promise would nullify the statute quoted above.

Unfortunately for plaintiff, he consented to the writing of April 17, which completely superseded the prior oral negotiations, including the promise to employ him, and the statutes of this state now forbid him to say that there ever was any oral promise for his employment. In frankly stating all the facts out of which this controversy arose, the plaintiff has successfully pleaded himself out of court. His complaint does not state any cause of action.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied, December 17, 1909.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,648.—STATE, RESPONDENT, *v.* GEORGE PLATT, APPELLANT.

Appeal from District Court, Jefferson County; Lew. L. Callaway, Judge.

On motion to dismiss appeal.

Decided May 7, 1909.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of the attorney general, supported by affidavit, setting forth that brief of appellant had not been served upon counsel for the state within forty-five days, or at all.

Messrs. Denny & Davis, and Mrs. Ella Knowles-Haskell, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 2,726.—IN RE APPLICATION OF B. S. THRESHER FOR WRIT OF HABEAS CORPUS, FOR AND ON BEHALF OF THOMAS STAGGS.

Decided May 24, 1909.

PER CURIAM.—Applicant's petition for a writ of *habeas corpus* is, after due consideration by the court, denied.

Mr. B. S. Thresher, for Complainant.

No. 2,742.—STATE EX REL. E. S. JOHNSON, RELATOR, v. FOURTH JUDICIAL DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of prohibition.

Decided June 28, 1909.

PER CURIAM.—Relator's petition for writ of prohibition herein is, after due consideration by the court, denied.

Messrs. Marshall & Stiff, for Relator.

No. 2,789.—STATE EX REL. FRANK KNUCKLEY, RELATOR, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

Original application for writ of prohibition.

Decided October 11, 1909.

PER CURIAM.—Relator's application for writ of prohibition, heretofore submitted, is, after due consideration by the court, denied.

Mr. John A. Davies and *Messrs. Maury & Templeman*, for Relator.

No. 2,748.—DAN. SHEA, BY HIS GUARDIAN AD LITEM, JOHN SHEA, RESPONDENT, v. BUTTE ELECTRIC RY. CO. ET AL., APPELLANTS.

Appeal from District Court, Silver Bow county; Jeremiah J. Lynch, Judge.

On motion to dismiss appeal.

Decided October 22, 1909.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, in accordance with stipulation of counsel.

Mr. W. M. Bickford, Mr. Geo. F. Shelton, and Mr. H. C. Hopkins, for Appellants.

Messrs. Breen & HogevoU, for Respondent.

No. 2,736.—STATE, RESPONDENT, *v.* G. M. JOHNSTON, APPELLANT.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

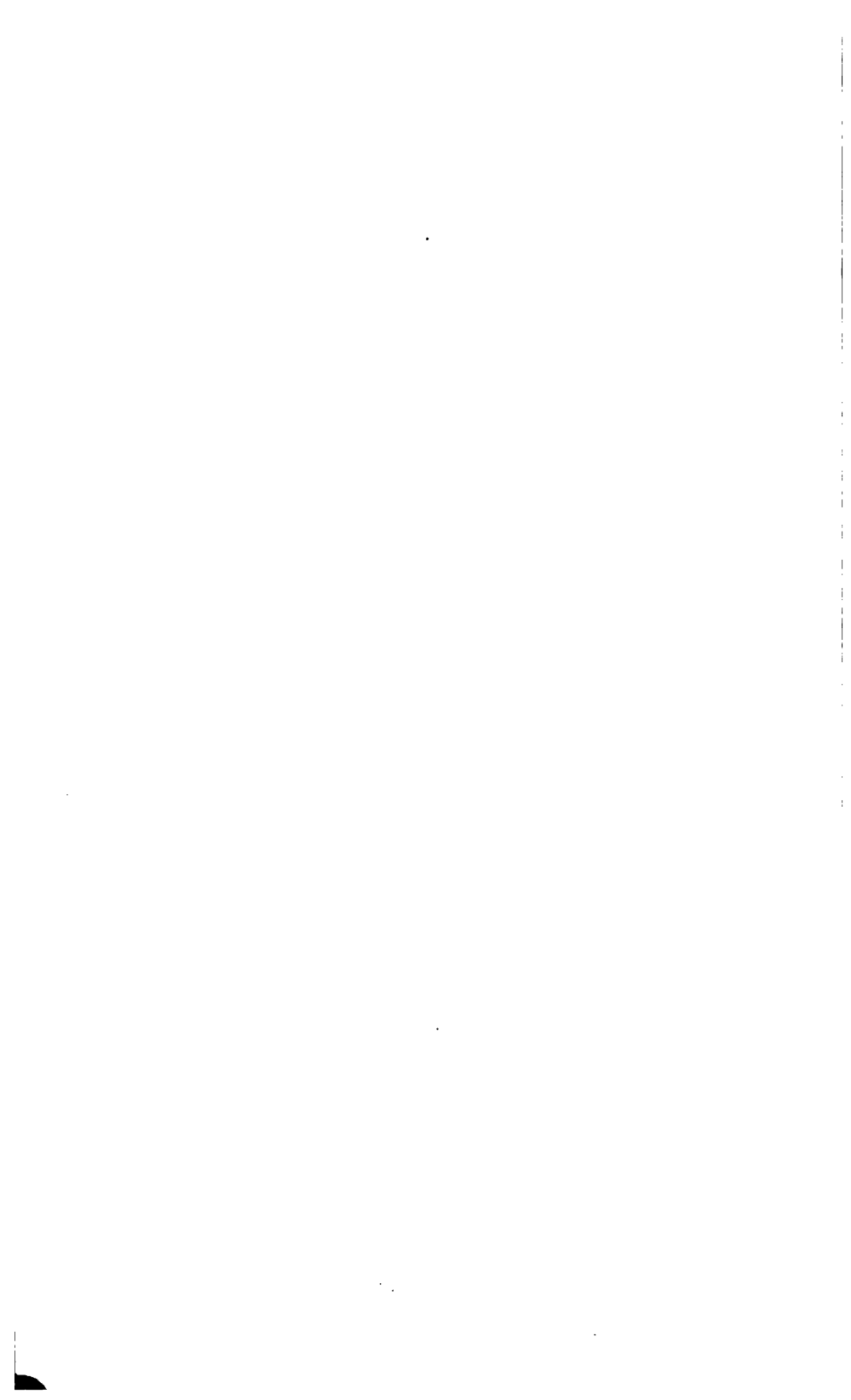
On motion to dismiss appeal.

Decided November 22, 1909.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, in accordance with stipulation of counsel.

Mr. W. B. Rodgers, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.



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See, also, Record on Appeal; Waiver.

Actions—Dismissal—Nonappealable Order—Final Judgment.

1. An order dismissing an action for failure of defendant company to demand and have entered a judgment in its favor within six months after rendition of verdict, is not a final judgment nor an order from which an appeal may be taken.—*Hovey v. Northern Pac. Ry. Co.*, 40.

Evidence—Objection not Made in District Court.

2. An objection to the introduction of testimony not made in the district court cannot be raised for the first time on appeal.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124; *Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Theory of Case.

3. Where a cause was tried on a theory adopted by plaintiff's counsel, he will not be heard to complain on appeal that such theory was wrong.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Physicians and Surgeons—Revocation of License—Special Proceeding.

4. The application of a physician to the district court to have the action of the state board of medical examiners, in revoking his license for alleged unprofessional and dishonorable conduct, judicially determined, is a special proceeding from the judgment in which an appeal lies to the supreme court.—*State ex rel. Gattan v. District Court*, 134.

Certiorari—Error Within Jurisdiction.

5. Error within jurisdiction is not reviewable on *certiorari*.—*State ex rel. Gattan v. District Court*, 134.

Appeal—Dismissal—Record.

6. An appeal from an order denying a new trial will be dismissed where a copy of the order denying the motion is not incorporated in the transcript.—*Hale v. County of Jefferson et al.*, 137.

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7. Where the record on appeal in an action against three defendants showed a judgment against one only, and a joint notice of all defendants recited that they intended "to move the court to vacate the verdict rendered against *them*, and to grant a new trial thereof," while the order of the court denying the motion referred to only one of defendants, the attempted appeals will be dismissed. (MR. JUSTICE SMITH dissenting.)—*Hall v. Butte Electric Ry. Co.*, 144.

Review—Assignments of Error—Briefs.

8. Review on appeal is confined exclusively to matters properly assigned in appellant's brief.—*Foster et al. v. Winstanley et al.*, 314.

Specifications of Error—Briefs—Review.

9. Error pointed out in appellant's brief but not based upon any specification of error will not be considered on appeal.—*Toole v. Weirick et al.*, 359.

Equity—Findings—Insufficiency of Evidence—Extent of Review.

10. In reviewing an assignment that the evidence is insufficient to warrant the findings in an equity case, the supreme court will go no further than to determine whether there is a decided preponderance in the evidence against them, and if upon examination of the testimony such preponderance is not found, they will not be disturbed.—*Watkins v. Watkins*, 367; *Copper Mt. M. & S. Co. v. Butte etc. Co.*, 487.

Assignments—Review.

11. Only those assignments of error which are argued in the brief will be considered on appeal.—*Watkins v. Watkins*, 367.

Appeal—Dismissal—Technical Grounds.

12. The law favors the right of appeal; hence, where a substantial compliance with the statutes and rules of the supreme court regulating appeals is shown, dismissal, asked on purely technical grounds, will not be ordered.—*Smith et al. v. Duff et al.*, 374.

District Courts—Rules—Construction—Review.

13. It is within the province of the district court to construe its own rules, and the supreme court will not interfere therewith, unless the construction is clearly unreasonable and erroneous.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Evidence—Admission of Fact Presumed.

14. Error cannot be predicated upon the admission of evidence to establish a fact which may be presumed to exist.—*Golden v. Northern Pacific Ry. Co.*, 435.

Finding Favorable to Appellant—Right to Complain.

15. A finding in favor of defendant on his counterclaim "and against the plaintiff, for the sum of no dollars," was in the latter's favor, of which he will not be heard to complain.—*Sutton v. Lowry et al.*, 462.

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Actions Against, in President's Name.

1. A voluntary association of laborers cannot, in the absence of statute authorizing it, be sued in the name of its president.—Vance v. McGinley, 46.

Judgment Against President—Error.

2. *Held*, that a judgment against defendant personally, who was sued as president of a labor organization by a member of it to recover certain pecuniary benefits which he alleged he was entitled to from the association, was not supported by the complaint which neither stated a cause of action against him individually nor in his official capacity.—Vance v. McGinley, 46.

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BONA FIDE PURCHASER.

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1. A *bona fide* purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and who purchases in the honest belief that his vendor had a right to sell, without notice, either actual or constructive, of any adverse rights, claims, interests or equities of others in and to the property sold.—Foster et al. v. Winstanley et al., 314.

Real Property—Cancellation of Deed—Consideration—Antecedent Debt.

2. One to whom a transfer of real estate was made without present consideration, but merely for the purpose of securing an antecedent debt, did not occupy the position of an innocent purchaser; therefore, since he had parted with nothing of value, the cancellation of the deed resulted in no loss to him and he has no cause for complaint.—Foster et al. v. Winstanley et al., 314.

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BOUNDARIES.

Insufficient evidence,—see New Trial, 8.

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1. Review on appeal is confined exclusively to matters properly assigned in appellant's brief.—*Foster et al. v. Winstanley et al.*, 314.

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2. Error pointed out in appellant's brief but not based upon any specification of error will not be considered on appeal.—*Toole v. Weirick et al.*, 359.

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3. Only those assignments of error which are argued in the brief will be considered on appeal.—*Watkins v. Watkins*, 367.

Assignments of Error—Waiver.

4. Assignments of error made in the brief but not argued will be deemed waived.—*Moran et al. v. Ebey*, 555.

BROKERS.

Real Estate—Right to Commission—"Indirectly" Interesting Purchaser—Evidence.

1. Defendant had employed plaintiff, a real estate broker, to find a purchaser for his ranch. The contract provided that if the sale was made to one who had become interested in the property through plaintiff's efforts, directly or indirectly, he was to receive a commission of \$500. Through plaintiff's endeavors one G. was induced to inspect the ranch, and the latter, while not becoming a purchaser himself, imparted the information thus obtained to P., who thereupon in conjunction with another entered into negotiations with defendant owner directly and bought the property. *Held*, that plaintiff was entitled to the commission, inasmuch as through his efforts a chain of events was set in motion which finally culminated in the sale.—*Shober, Jr., v. Dean*, 225.

Contract of Employment—Evidence.

2. Evidence held not to show that a letter, upon which defendant based his claim that a contract of employment had been entered into between himself and plaintiff whereby he was to sell a mining claim for a stipulated sum, did not bear the construction placed upon it by defendant.—*Dreeland v. Pascoe*, 290.

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Master and Servant—Nonperformance of Statutory Duty—Proximate Cause.

1. In an action to recover damages for the death of an employee, alleged to have been caused through the fault of the employer by reason of his nonperformance of a statutory duty relative to safeguarding appliances, the burden is upon plaintiff to show the causal connection between the negligence as alleged and the injury, *i. e.*, that defendant's negligence in failing to observe the statutory requirement was the proximate cause of the injury.—*Monson v. La France Copper Co.*, 50.

License Taxes—Unconstitutionality.

2. The burden of showing that a license tax is unconstitutional as denying the equal protection of the laws, rests upon plaintiff.—*Quong Wing v. Kirkendall*, 64.

Sales—Action for Price.

3. One who seeks to recover the contract price of goods shipped on order is bound to show by a preponderance of evidence that they are of the kind and quality ordered.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Taxation—Exemption.

4. One claiming an exemption from taxation has the burden of showing that he is entitled to it; but in an action to enjoin the collection of taxes upon a ditch used solely in connection with placer mining operations and therefore not subject to taxation, the burden rests upon the state to show that the ditch has a value independent of the placer mining claim, so as to render it liable to taxation as provided in section 2500, Revised Codes.—*Hale v. County of Jefferson et al.*, 137.

Trusts—Counterclaims.

5. Where, in a suit to enforce a trust in corporate stock, defendant admitted the allegations of the complaint, save that plaintiff was entitled to the stock, and urged as a defense a counterclaim constituting a lien on the stock, defendant had the burden of proof.—*Dreeland v. Pascoe*, 290.

Water Rights—Adverse User.

6. The burden of proving an adverse user of water rests upon him who alleges it.—*Smith et al. v. Duff et al.*, 374.

Water Rights—Development of Water.

7. One who based his right to the exclusive use of water upon an alleged development of a supply had the burden of proving that in developing it he did not intercept water to which others were rightfully entitled.—*Smith et al. v. Duff et al.*, 382.

Personal Injuries—Postal Clerks—Passengers.

8. Where, in an action against a railroad company by a railway postal clerk for injuries sustained while off duty, caused by the derailment of a train, plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was on him to prove that he was a passenger, and it was incumbent on him to show, either that defendant was under a specific contractual or statutory obligation to the government to carry him in the mail-car where he was at the time, or that defendant recognized a request for transportation when he was off duty.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

State Board of Health—Appeal from Order of Board.

9. A city against which the state board of health had issued an order prohibiting it from emptying its sewage into a river before proper purification, had the burden of showing, on appeal to the district court, that the order was not justified; hence, where it produced no evidence whatever, and the order, upon its face, bore no evidence of its own invalidity, the order will be held valid.—*City of Miles City v. State Board of Health*, 405.

Mines—Forfeiture.

10. One claiming the forfeiture of a mining claim for alleged non-representation must plead it specially and has the burden of establishing his contention by clear and convincing proof.—*Copper Mt. M. & S. Co. v. Butte etc. Co.*, 487.

Same—Contiguous Group—Representation Work.

11. The burden of proving that representation work done upon one of a contiguous group of quartz lode claims was done for the benefit of all, that it was adapted to the development of all, and was intended for that purpose, rests upon him against whom a forfeiture is sought for alleged nonperformance of assessment work upon the other claims in the group.—*Copper Mt. M. & S. Co. v. Butte etc. Co.*, 487.

CERTIORARI.

Physicians and Surgeons—Revocation of License—Failure to Appeal.

1. Where a physician fails to avail himself, within one year after entry of judgment, of the remedy by appeal, from the action of the district

court in affirming the revocation of his license by the state board of medical examiners, he may not thereafter have it reviewed on *certiorari*. State ex rel. Gattan v. District Court, 134.

Error Within Jurisdiction—Review.

2. Error within jurisdiction is not reviewable on *certiorari*.—State ex rel. Gattan v. District Court, 134.

CITIES AND TOWNS.

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CLAIM AND DELIVERY.

Live Stock—Sales—Contracts—Construction.

1. Evidence examined, in an action in claim and delivery to recover a number of cattle, alleged to belong to plaintiff by virtue of an oral contract of sale under which he became the owner of the brand and of all the cattle bearing it, whether actually delivered or not, and held to show the contract to have been that only such cattle as were actually delivered to plaintiff and paid for at the rate per head agreed upon should become his property.—Ettien v. Drum, 34.

Same—Instructions—Nonprejudicial Error.

2. Defendant claimed to have purchased the cattle in dispute from one D., who theretofore had sold to plaintiff the major portion of the herd with the brand, under the contract referred to in the foregoing paragraph. The question before the jury was whether D. had sold to defendant cattle previously sold and delivered to plaintiff. In an instruction the court defined the term "innocent purchaser," and plaintiff objected to the definition and suggested an amendment, which the court refused. Held, that the question whether defendant was an innocent purchaser was not in the case, inasmuch as, if defendant bought cattle which belonged to plaintiff by actual purchase and delivery, the latter could recover irrespective of the good faith of defendant, and that therefore the refusal of the court to permit the amendment was not prejudicial error.—Ettien v. Drum, 34.

Same—Hearsay Testimony—Harmless Error.

3. The statements of a bank officer, who testified partly from personal knowledge as to transactions between the parties, partly from statements made to him by them, and partly from knowledge obtained by cashing checks covering the transactions, could not be said to have been strictly hearsay, and an order refusing to strike such testimony did not constitute reversible error, especially where from other evidence it appeared that plaintiff could not have suffered prejudice from the ruling.—Ettien v. Drum, 34.

Same—Verdict—Evidence—Sufficiency—Review.

4. Where the evidence in an action in claim and delivery was almost wholly circumstantial and in such a condition that the mind was left in doubt as to the justness of plaintiff's claim, upon whom was the burden of proof, a verdict in favor of defendant will not be disturbed on appeal under an assignment that it is not supported by the testimony.—Ettien v. Drum, 34.

Findings—Responsiveness to Issues.

5. In claim and delivery, a general finding of the issues in favor of plaintiff includes all the issues, except that of value; therefore the contention that the general verdict in such an action was insufficient to support the judgment, in that it did not specifically find that at the commencement of suit defendants wrongfully detained from plaintiff the possession of the property in dispute, was without merit.—Sullivan v. Girson et al., 274.

Nature of Action—Parties.

6. The purpose of an action in claim and delivery being to recover possession of specific property, or the value of it in case possession of it cannot be had, the person who at the commencement of suit has possession of and wrongfully detains it, is the proper person to be sued.—*Sullivan v. Girson et al.*, 274.

Present Possession by Defendant—Evidence.

7. Evidence which showed that defendants, engaged in the pawn-broking business, admitted that they had a ring which was the subject matter of a suit in replevin, on the day before suit and on the day action was begun but before it was actually brought, *held* sufficient to have made out a *prima facie* case of the present actual possession by defendants at the time the action was commenced.—*Sullivan v. Girson et al.*, 274.

Opinion Evidence—Value.

8. A witness who had purchased a ring about two and one-half years prior to the time it became the subject of an action in claim and delivery, and who testified that he had frequently priced and purchased precious stones in different cities and knew what stones of the size and quality of those in the ring were selling for in the city in which the controversy arose, was competent to estimate its value, even though he had not qualified as an expert.—*Sullivan v. Girson et al.*, 274.

Secondary Evidence—When Proper.

9. *Semble*: It would seem that, after refusing to produce a ring sought to be recovered in an action in claim and delivery, for inspection by witnesses and jury, and thus rendering it impossible for plaintiff to present the best evidence of its value, defendants ought not to be heard to complain that the best evidence was not produced upon that question.—*Sullivan v. Girson et al.*, 274.

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CLERK OF DISTRICT COURT.**Costs—Insertion in Judgment—Ministerial Duty.**

1. The clerk of the district court in carrying out the provisions of section 7173, Revised Codes, relative to the insertion of costs in the judgment where the same have been taxed or ascertained, acts in a ministerial capacity.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Term of Office—Constitutional Limitation.

2. Section 12, Article VIII of the Constitution provides, *inter alia*, that the term of office of district judge shall be four years, "except that the district judges first elected shall hold their offices only until the general election in the year 1892, and until their successors are elected and qualified." Section 18, of the same Article, declares that the clerk of the district shall be elected at the same time and for the same term as the district judge. *Held*, on *quo warranto*, that under these provisions the terms of these judicial officers are strictly limited to four years, and that the words "and until their successors are elected and qualified" refer to those officers only who were first elected after the adoption of the Constitution, and have no application to those thereafter chosen.—*State ex rel. Jones v. Foster*, 583.

Same—Elections—Tie Vote—Vacancy—Power of County Commissioners to Fill

3. Under the rule stated in the above paragraph, a vacancy occurred, by operation of law, in the office of the clerk of the district court upon the expiration of the term of the then incumbent, where by reason of a tie vote the electors failed to choose his successor, which vacancy the board of county commissioners were authorized to fill by appointment, under section 457, Revised Codes.—*State ex rel. Jones v. Foster*, 583.

CONDITIONAL SALES.

See Sales, 6-10.

CONFESSIONS.

See Criminal Law, 25.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article III, section 15.....	105
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CONSTITUTION.

Indebtedness of counties,—see Counties, 1-3.

Terms of office of district judges and clerks,—see Clerk of District Court, 2, 3.

Statutes—Constitutionality.

1. A statute may not be declared unconstitutional unless it is clearly so.—*Quong Wing v. Kirkendall*, 64.

Occupation Tax—Constitutionality—Burden of Proof—Presumptions.

2. The burden of showing that a statute imposing a license tax is unconstitutional as denying the equal protection of the laws, in that the classification therein made is arbitrary, unreasonable or unjust, rests upon plaintiff. The presumption obtains that the legislature in enacting it exercised reasonable discretion in making the classification.—*Quong Wing v. Kirkendall*, 64.

Laundries—Statutes—Constitutionality.

3. Assuming that section 2776, Revised Codes, providing that every person engaged in the laundry business, other than steam laundry business, shall pay a license fee of \$10 per quarter, etc., classifies laundries for license purposes [which is doubted], into steam laundries and laundries operated by hand, such classification held not arbitrary or unwarrantable.—*Quong Wing v. Kirkendall*, 64.

Occupation Tax—Equal Protection of Laws.

4. The legislature is not required to tax all occupations equally or uniformly; hence it had power to single out proprietors of hand laundries and compel them to pay a license; and so long as the law was uniform as to all persons operating such laundries, there was no denial of the equal protection of the laws.—*Quong Wing v. Kirkendall*, 64.

Laundries—Discrimination.

5. Section 2776, Revised Codes, imposing a license fee of \$10 per quarter upon every person engaged in the laundry business, other than steam laundries, is not unconstitutional because it exempts from its operation women engaged in such business, provided not more than two are employed or kept at work.—*Quong Wing v. Kirkendall*, 64.

State Board of Examiners—Powers—Claims Against State.

6. Section 20, Article VII, of the Constitution, and section 226, Revised Codes, empowering the state board of examiners to examine all claims against the state, except salaries of officers fixed by law, apply to unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of the state government having authority to fix them.—*State ex rel. Schneider v. Cunningham*, 165.

Statutes—Constitutionality—How Determined.

7. An Act of the legislature will not be declared invalid as repugnant to the Constitution except where the repugnancy is established beyond a reasonable doubt.—*State ex rel. Peyton v. Cunningham*, 197.

Legislative Powers—Force of Joint Resolution.

8. No Act of legislation has the force of law, even though unanimously passed and approved by the governor, unless the requirements of the Constitution (Article V, secs. 19, 20, 23), that every law shall be passed by bill, that it must have an enacting clause, and a title clearly expressing the subject of the enactment, are met; hence a resolution in the passing of which neither of these essentials had been observed, was not an authoritative expression of the legislative will upon the subject with which it deals.—*State ex rel. Peyton v. Cunningham*, 197.

Statutes—Constitutionality—Determination.

9. Unless the necessity of passing upon the constitutionality of a statute is urgent and imperative, the supreme court will not do so on appeal. *Sanden v. Northern Pac. Ry. Co.*, 209.

Legislative Procedure—Enrolled Bill—Conclusiveness.

10. In determining whether an Act has been constitutionally passed, recourse may not be had to any other evidence than the enrolled bill, except where the alleged invalidity of the Act is based upon a failure to enter the names of those voting upon its final passage, in which case the journal may be consulted.—*State ex rel. Gregg et al. v. Erickson et al.*, 280.

Foreign Corporations—Privileges—Constitutional Provisions—Construction.

11. The inhibition of the State Constitution (Art. XV, sec. 11), that no foreign corporation shall be allowed to exercise or enjoy within the state any greater rights or privileges than are possessed or enjoyed

by corporations of the same or similar character created under the laws of Montana, is simply a limitation placed upon the legislature in enacting laws, and does not mean that the placing of a burden upon a domestic corporation shall have the effect of imposing a like one upon foreign corporations.—*Uihlein v. Caplice Commercial Co.*, 327.

Same—Statutes—Validity—Who may Assail.

12. It is only in cases where a foreign corporation is attempting to exercise or enjoy greater privileges than those possessed by domestic corporations expressly given to it by the legislative assembly contrary to the provisions of section 11, Article XV, of the Constitution, that its right to exercise the same may be questioned.—*Uihlein v. Caplice Commercial Co.*, 327.

CONTRACTS.

See, also, Brokers, 1; Claim and Delivery, 1.

Agreement to convey real property,—see Real Property, 1-8.

Void contracts,—see Counties, 3; Sales.

Illegality,—see Pleading and Practice, 19, 27, 28.

Subject Matter—How to be Expressed.

1. In order to constitute a valid contract, the subject matter of the agreement must be expressed by the parties in such terms that it can be ascertained with a reasonable degree of certainty what their intentions were.—*Price et al. v. Stipek*, 426.

When Agreement Unenforceable.

2. *Held*, under section 4999, Revised Codes, that, where defendant requested plaintiff firm, at the solicitation of one of its traveling salesmen, on one of its printed order blanks covering many pages and containing a large variety of all kinds of jewelry of different quality and price, to ship to him "the goods listed in this order upon the terms named therein," and it could not be determined therefrom how many articles of any particular kind or class had been ordered or what prices were to be paid, the memorandum of sale was so indefinite and uncertain in its terms as to make it unenforceable at law.—*Price et al. v. Stipek*, 426.

Breach—Contingencies—Complaint.

3. Where plaintiff's right to recover, in an action for the breach of a contract, is contingent upon the happening of a future event, he must allege in his complaint that the contingency has arisen and that he has fully performed on his part.—*Sutton v. Lowry et al.*, 462.

Same — Breach — Contingencies — Full Performance — Complaint — Insufficiency.

4. Plaintiff brought suit to recover on an oral contract, under the alleged terms of which he was to take charge of the defense in an action against defendants to recover damages for wrongfully extracting ores from a mining claim adjoining their own, he, in the event of the successful termination of the litigation, to be recompensed by a lease on defendant's mine and in various other ways. The complaint alleged that such litigation was still undetermined, but that he had been prevented from fully performing on his part by the action of defendants in selling their mine and parting with possession thereof. *Held*, that the sale of their property by defendants did not *ipso facto* terminate the litigation, and that, nothing appearing in the complaint that it would not be continued or that plaintiff was released from performing on his part, the pleading did not state a cause of action on the contract.—*Sutton v. Lowry et al.*, 462.

Choses in Action—Assignment—Illegality—When Defense not Available.

5. O. assigned to D. an order for wages earned in cutting timber. The latter paid O. part in cash and gave him a duebill for the balance,

and as a consideration for accepting the order required him to assign to him his claim against his employer. In an action by O. to recover the balance due, D. interposed the defense that the timber had been illegally cut on unsurveyed public land. *Held*, that defendant could not raise the illegal character of the transaction out of which the claim sued on arose, but that his promise to pay, as evidenced by the duebill, was so far a new and independent agreement as not to be tainted with the illegality of the arrangement between plaintiff and his employer.—*Owens v. Davenport et al.*, 555.

In Writing, Supersede Oral Negotiations—Exception to Rule.

6. A contract in writing supersedes all the prior or contemporaneous oral negotiations and stipulations relating to the subject matter of the agreement between the contracting parties; and therefore a party to it will not be heard to complain that there were other stipulations, unless they pertain to some collateral matter which operated as an inducement to his entering into the principal agreement.—*Kelly v. Ellis et al.*, 597.

Same—Complaint—Insufficiency.

7. *Held*, under the rule above, that plaintiff's complaint, in an action for damages for deceit, alleging, in substance, that he had entered into an oral contract the provisions of which were subsequently reduced to writing, to sell, and sold, to defendant company his sheep ranch, etc.; that in the oral negotiations ending in the sale it was understood and agreed that after such sale defendant would make him manager of its sheep business; that the memorandum of sale did not contain any reference to his employment as manager, but that upon assurance by the president of defendant that this provision of the oral agreement would be carried out, he signed same; that such promise was the "*most important condition of the agreement*," and that but for such promise he would not have sold his property to defendant, did not state a cause of action and that a demurrer thereto was properly sustained.—*Kelly v. Ellis et al.*, 597.

CONVEYANCES.

Cancellation of deed,—see Trusts and Trustees, 1, 2.

Failure to convey,—see Real Property, 1-8.

CORPORATIONS.

Extension of corporate existence,—see State Banks.

Increase of capital stock,—see State Banks.

Foreign—"Carrying on" of Business—What does not Constitute.

1. *Held*, that the shipping of beer into the state by a foreign corporation and selling the same to a distributing agent, did not constitute a carrying on of business in the state within the meaning of section 4413, Revised Codes, relating to the steps necessary for such a corporation before it can carry on business in Montana.—*Uihlein v. Caplice Commercial Co.*, 327.

Same—Noncompliance with Statute—Right to Maintain Actions.

2. The failure of a foreign corporation to comply with the law authorizing such corporations to do business in the state did not deprive it of the right to maintain a suit to quiet title to real property claimed by defendant as a donation. Its action in this respect was not an attempt to enforce a contract.—*Uihlein v. Caplice Commercial Co.*, 327.

Same—Holding Property—Statutes—Applicability.

3. *Held*, that section 3823, Revised Codes, declaring that a corporation cannot hold property in a county, or maintain an action in relation

thereto, unless it has first filed a certified copy of its articles of incorporation in the office of the county clerk, applies to domestic corporations only.—Uihlein v. Caplice Commercial Co., 327.

Same—Privileges—Constitutional Provisions—Construction.

4. The inhibition of the State Constitution (Art. XV, sec. 11), that no foreign corporation shall be allowed to exercise or enjoy within the state any greater rights or privileges than are possessed or enjoyed by corporations of the same or similar character created under the laws of Montana, is simply a limitation placed upon the legislature in enacting laws, and does not mean that the placing of a burden upon a domestic corporation shall have the effect of imposing a like one upon foreign corporations.—Uihlein v. Caplice Commercial Co., 327.

Same—Statutes—Validity—Who may Assail.

5. It is only in cases where a foreign corporation is attempting to exercise or enjoy greater privileges than those possessed by domestic corporations expressly given to it by the legislative assembly contrary to the provisions of section 11, Article XV, of the Constitution, that its right to exercise the same may be questioned.—Uihlein v. Caplice Commercial Co., 327.

COSTS.

Insertion in judgment,—see Clerk of District Court, 1.

Allowance—When Error.

1. It was error to allow costs where no showing had been made to the court that the successful party had claimed them, as provided in section 7170, Revised Codes.—Butte Northern Copper Co. et al. v. Radmilovich, 157.

Adding to Judgment After Appeal—Error.

2. After an appeal has been perfected, the district court is without jurisdiction to amend the judgment by adding a provision that the successful party recover his costs.—Butte Northern Copper Co. et al. v. Radmilovich, 157.

Memorandum—Verification—Sufficiency.

3. An affidavit to a memorandum of costs made by one of defendant's attorneys, stating that the memorandum was true and correct, and the items were reasonable, and necessarily incurred in defense of the cause, to the best of his knowledge and belief, substantially complied with section 7170, Revised Codes.—Hoskins v. Northern Pacific Ry. Co., 394.

Rules—Number of Witnesses.

4. Under a rule of the district court that in all civil actions not more than five witnesses should be examined as to "any question of fact or issue in the cause," the phrase quoted *held* to refer to any single, substantial allegation of the pleadings on which an issue is raised, and not to the ultimate fact to be determined; therefore where several grounds of negligence were alleged by plaintiff in a personal injury action against a railway company, he could not complain that defendant, on nonsuit, was allowed costs of witnesses brought into court to disprove such allegations.—Hoskins v. Northern Pacific Ry. Co., 394.

Verified Memorandum—Prima Facie Evidence of Correctness.

5. A verified memorandum of costs is *prima facie* evidence of the correctness of the items of disbursements enumerated therein.—Hoskins v. Northern Pacific Ry. Co., 394.

COUNTERCLAIMS.

Breach of conditional sale contract of livestock,—see Sales, 8.

What Constitutes.

1. To constitute a counterclaim, a failure to plead which will thereafter bar an action thereon, it must appear affirmatively from the plead-

ings that the cause of action asserted is one "arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." (Revised Codes, sec. 6541.)—Kaufman v. Cooper et al., 146.

New Matter—"Connected with Subject of Action."

2. That new matter constituting a counterclaim may be said to be "connected with the subject of the action," it must present some legal relationship with the subject of plaintiff's action as disclosed in his complaint.—Kaufman v. Cooper et al., 146.

Same.

3. Defendants had brought an action against plaintiff to recover the amount of a note alleged to have been received by him to their use. In his answer plaintiff admitted the receipt of the money but denied the other material allegations of the complaint. Subsequently plaintiff brought suit against defendants on an indebtedness alleged to be due him from them on a sale of goods. The consideration for the note did not appear in the record on appeal in the suit by plaintiff against defendants. *Held*, that plaintiff's cause of action for the unpaid balance of the purchase price of the goods sold to defendants, did not present any legal connection with the money which plaintiff had collected on the note, and that therefore his failure to plead it as a counterclaim in answer to the complaint of defendants, did not constitute a bar to his suit.—Kaufman v. Cooper et al., 146.

COUNTIES.

Constitution—Indebtedness—Items not to be Considered.

1. The mileage and *per diem* of county commissioners charged to their county on account of trips made to the site of a bridge, and expenses incurred for services of the county surveyor in surveying and locating the site, are not proper items to be taken into consideration in arriving at the amount of indebtedness (\$10,000) which could lawfully be incurred by the county, under section 5, Article XIII, of the Constitution, on account of the construction of the bridge, without first obtaining the approval of a majority of the electors of the county.—Jenkins v. Newman et al., 77.

Indebtedness—Constitutional Limit—Items to be Considered.

2. Where it becomes necessary to employ inspectors, other than county officers, in the construction of a bridge, the sums so expended must be regarded as a part of the aggregate cost of the project in arriving at the amount county commissioners may disburse without consulting the electors of their county.—Jenkins v. Newman et al., 77.

Same—"Bridge"—What Constitutes—Void Contract.

3. The commissioners of two counties entered into a contract for the construction of a bridge over a river separating them. The contract price was \$19,998, and each county became obligated in the sum of \$9,999. Without proper approaches, the cost of which would approximate \$300, the bridge was useless, but the contract did not make any provision for them. Section 5, Article XIII, of the Constitution, declares that no county shall incur any indebtedness, for any single purpose, to an amount exceeding \$10,000, without first obtaining the consent of a majority of the electors of the county. Under section 1416, Revised Codes, the word "bridge" includes the approaches thereto. *Held*, that the single purpose sought to be accomplished by the commissioners was the building of a bridge, with approaches thereto, and that since that purpose could not be consummated without exceeding the constitutional limitation, the contract was void.—Jenkins v. Newman et al., 77.

COUNTY COMMISSIONERS.

See Counties, 1-3.

Power to fill vacancies,—see Clerk of District Court, 3.

COURTS.

Legislation—Courts may not inquire into wisdom of.

1. Courts may not inquire into the wisdom of legislative enactments. *Morrison v. La France Copper Co.*, 50.

Removal of Causes—Jurisdiction of State Court.

2. Every court has the power to determine the question of its own jurisdiction, such determination being subject to review by the courts which have jurisdiction for that purpose; and this rule applies to the right of a state court to determine its jurisdiction upon the filing of a petition for removal of the cause to the federal court.—*Golden v. Northern Pacific Ry. Co.*, 435.

CRIMINAL LAW.

Cross-examination—Witnesses—Degrading Character.

1. The court erred in overruling objections of defendant, charged with crime, to questions asked his (defendant's) brother by the county attorney, on cross-examination, whether he was the same Pat Crowe who had been connected with the Cudahy kidnaping, and whether he had not been more or less directly implicated in other offenses of like character. The questions had a tendency to degrade and discredit the witness. (MR. JUSTICE SMITH dissenting.)—*State v. Crowe*, 174.

Same.

2. It was also error to permit the witness above referred to, to be asked on cross-examination whether he knew of his brother, the defendant, ever having been involved in difficulty or been defendant in a criminal proceeding before.—*State v. Crowe*, 174.

Insanity Preceding Offense—Evidence—Discretion.

3. Where the defense relied on by one charged with crime is insanity, the length of time preceding the offense to which inquiry relative to defendant's mental condition may be directed is a matter addressed to the sound legal discretion of the trial judge, subject to review for abuse of such discretion only.—*State v. Crowe*, 174.

Insanity—Cross-examination.

4. A lay witness having testified that in his opinion defendant was of unsound mind at the time the offense charged was committed, it was proper to ask him on cross-examination whether he thought defendant had sufficient mental capacity to distinguish between right and wrong and would know that it was wrong to shoot a man, or steal or commit burglary.—*State v. Crowe*, 174.

Same.

5. The witness mentioned in paragraph 4, above, having answered the question in the affirmative, he should have been allowed on redirect examination to give his opinion as to whether defendant, if he knew it was wrong to do the things enumerated, had sufficient mental capacity to do right and avoid wrong, since defendant could not have anticipated the extent of the cross-examination, and therefore could not, in his direct examination, cover every possible phase of insanity which might be opened to inquiry.—*State v. Crowe*, 174.

Same—Insanity—Irresistible Impulse.

6. Where defendant on trial for crime relies on the defense of insanity, the question of irresistible impulse is a proper subject of inquiry.—*State v. Crowe*, 174.

Same—Hypothetical Questions—Contents.

7. A hypothetical question on the subject of defendant's insanity need not embrace all the evidence given relating to his mental condition.—*State v. Crowe*, 174.

Same—Instructions—Burden of Proof.

8. In instructing the jury in a criminal action that the defense of insanity "is to be weighed fully and justly, and *when satisfactorily established*, must recommend itself" to their favorable consideration, etc., the court impliedly cast the burden of satisfactorily establishing that defense upon the defendant, and therefore committed error. (MR. JUSTICE SMITH dissenting.)—*State v. Crowe*, 174.

Same—Disparagement of Defense by Court—Error.

9. It was also error to instruct that the jury should examine the defense of insanity "with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt." The defendant is entitled to make any defense recognized by the law and have it submitted without disparagement by the court. (MR. JUSTICE SMITH dissenting.)—*State v. Crowe*, 174.

Same—Instructions—Burden of Proof.

10. An instruction that, before the jury could acquit upon the ground of insanity, they must find defendant was laboring under such a defect of reason from disease of the mind as to not know—that is, as not to have sufficient mental capacity to know—the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong, and one which declared that, before acquittal could be had on that ground, it must appear that defendant was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment, while not inconsistent when viewed in the light of the whole charge, were so vague in language that the jury might reasonably have inferred from them that defendant had the burden of establishing his insanity.—*State v. Crowe*, 174.

Same—Reasonable Doubt.

11. The court further erred in charging the jury that it was for them to say whether the evidence, as a whole, convinced them of defendant's insanity, or raised in their minds a reasonable doubt on the subject. The instruction was objectionable because couched in the alternative. The only matter which should have been submitted for their determination was whether the evidence as a whole raised a reasonable doubt of defendant's sanity.—*State v. Crowe*, 174.

Same—Verdict of Acquittal—Form.

12. Where defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that they might find defendant guilty of assault in the first, second or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." (Revised Codes, sec. 9322.)—*State v. Crowe*, 174.

Drawing Jurors—Challenge to Panel.

13. The fact that two judges of a district court, divided into departments, sat together when an order for the drawing of jurors for their departments was made, is not ground for challenge to the panel.—*State v. Powers*, 259.

Same—Judicial Authority—Delegation—Challenge to Panel—Presumptions.

14. The court, in making the order above referred to, appointed three members of the bar to supervise the drawing of jurors. The record on appeal did not disclose that during the drawing the attorneys thus

appointed, attempted to exercise any judicial functions. *Held*, that the court's action did not constitute a valid ground for challenge to the panel as a delegation of judicial power. The presumption obtains that the judges and clerk did their duty.—*State v. Powers*, 259.

Same—Clerical Errors—Challenge to Panel.

15. Where "M. Meyer" responded to a summons to jury duty, and the original juror's slip bore his proper name and place of residence, the fact that the venire contained the name of "F. Meyer" and the sheriff's return showed that "Ed. Meyer" had been served was not ground for challenge to the panel. The names of "F. Meyer" and "Ed. Meyer" *held* to have been clerical errors.—*State v. Powers*, 259.

Evidence—Degree of Proof—Moral Certainty—Statutes.

16. The provision of section 7847, Revised Codes, that moral certainty, or that degree of proof which produces conviction in an unprejudiced mind, is all that is required, *held* applicable to criminal causes.—*State v. Powers*, 259.

Homicide—Self-defense—Instructions—Burden of Proof.

17. The court having instructed the jury that if it appeared to defendant, as a reasonable person, when he killed deceased, that it was necessary to do so in self-defense, he had a right to act on such appearances, although he was in no actual danger; that no greater burden rested on him than to raise a reasonable doubt concerning his guilt, and that if, after considering all the evidence, the jury were not satisfied beyond a reasonable doubt of his guilt, he should be acquitted,—the giving of the further instruction that defendant's cause of apprehension must have been reasonable and that it was for the jury to determine whether the facts constituting such reasonable cause of apprehension had been *established*, and, if not so established, defendant was not entitled to acquittal, could not have misled the jury into believing that the burden of proof was upon defendant to show that his apprehension was a reasonable one. (*MR. JUSTICE HOLLOWAY* dissenting.)—*State v. Powers*, 259.

Same—Self-defense—Instructions.

18. Where the only testimony that deceased assaulted defendant was that of defendant himself, which was not only not corroborated, but facts and circumstances were made to appear from which the jury could properly have determined that his version was not true, the refusal of an instruction on self-defense which proceeded upon the theory that defendant was confronted by the actual fact that deceased was attempting to commit a felony or to do some great bodily injury upon the person of accused, was properly refused.—*State v. Powers*, 259.

Same—Unnecessary Instructions.

19. Where, in a criminal action, the court had properly charged the jury on all branches of the case, refusal to instruct that each juror should render his verdict according to the law as given in the instructions, and according to the evidence; that private knowledge or belief acquired otherwise must be disregarded; that the verdict should not be based on probabilities of defendant's guilt; and that, even though the evidence might establish in their minds a strong suspicion, or a probability of defendant's guilt, he should not be convicted unless they were convinced of his guilt beyond a reasonable doubt, was proper.—*State v. Powers*, 259.

Same.

20. Error was not committed in refusing an instruction that the physical power and strength of the defendant and deceased should be considered by the jury in arriving at a verdict in a prosecution for homi-

cide. While properly a subject matter for argument to them, it was not one to be incorporated in the charge.—*State v. Powers*, 259.

Same—Information—Date of Death—Surplusage—Variance.

21. *Held*, that in an information charging murder it is not necessary to allege the date upon which deceased died, as distinguished from the date of assault; and that therefore the contention that there was a fatal variance between a pleading which charged that deceased was killed on a certain day and the evidence which showed that, while he was assaulted on that day, he died two days later, was without merit.—*State v. Powers*, 259.

Grand Larceny—Livestock—Evidence.

22. Section 8645, Revised Codes, declaring the stealing of any of the animals enumerated therein to be grand larceny, refers to live animals only; therefore, defendants, charged with stealing certain heifers, the carcasses of which, dressed for beef, were found concealed on the range, could be convicted only upon evidence showing beyond a reasonable doubt that they killed, or took part in killing, the animals. *State v. Keeland et al.*, 506.

Same—Corpus Delicti—How Established.

23. The *corpus delicti* in a prosecution for grand larceny, as well as in all other crimes, except in cases of unlawful homicide, in which cases the death of the person alleged to have been killed must be established directly, may be proved by circumstantial evidence.—*State v. Keeland et al.*, 506.

Same—Venue—Insufficiency.

24. Evidence *held* insufficient to show that the defendants killed the cattle, which were wont to range near the county and state lines and the carcasses of which were found concealed in a coulee, in the county in which the venue was laid. The venue must be proved beyond a reasonable doubt. (MR. JUSTICE SMITH dissenting.)—*State v. Keeland et al.*, 506.

Same—Confessions—What does not Constitute.

25. Statements made by defendants at the time of their arrest, and not in response to questions put to them by the person arresting, which implied guilt and by means of which they sought by corrupt means to influence the person having them in charge to permit defendants to escape, had none of the attributes of a confession, and hence, to make them admissible in evidence, it was not necessary to first show that they were not induced by fear, or threats, or the hope of leniency.—*State v. Keeland et al.*, 506.

Same—Expert Testimony—Admissibility.

26. The testimony of persons for many years engaged in the livestock business, that in their opinion the flesh of the cattle found concealed on the range, and with the larceny of which defendants stood charged, was that of animals killed and properly bled, was properly admitted, under section 7887, Revised Codes.—*State v. Keeland et al.*, 506.

Robbery—Information—Sufficiency.

27. An information charging that defendant did willfully, feloniously, etc., and with force and fear, commit the crime of robbery on one M., and taking from his person and immediate presence, with force against his will, certain articles of value, etc., was not fatally defective because charging the offense in the form of participial clauses instead of by direct allegation. The pleading was such as to enable a person of ordinary understanding to know what was intended to be charged, and therefore sufficient, under sections 9147, 9156, Revised Codes.—*State v. Pemberton*, 530.

Same.

28. Nor was the information above set forth objectionable because, instead of charging, in the words of the statute (Rev. Codes, sec. 8309), that the taking was accomplished "by means of force or fear," it alleged that it had been accomplished "with" force and fear; the word "with" being, in this connection, equivalent to the expression "by means of."—*State v. Pemberton*, 530.

Same—Information—Defects—Motion in Arrest—Waiver.

29. Defects in an information which, under section 9200, Revised Codes, must be taken advantage of by special demurrer, may not be urged in support of a motion in arrest of judgment; on such a motion all defects, except that of want of jurisdiction and the insufficiency of facts to state a public offense, are deemed waived.—*State v. Pemberton*, 530.

Same—Offer of Proof—Exclusion—When Proper.

30. Error cannot be predicated on the exclusion of an offer of proof covering a subject fully developed by other testimony.—*State v. Pemberton*, 530.

Same—Evidence—Mental Condition—Remoteness.

31. Defendant, charged with robbery, offered testimony to show that the prosecuting witness, when intoxicated, was subject to the hallucination that he was being or had been robbed, and in support thereof tendered proof to show that some fourteen years before he had a similar delusion. *Held*, that the offer was properly excluded, proof of a single instance of such derangement of mind, at so remote a period, being insufficient to show that the witness was affected with an habitual tendency or disposition to become subject to it whenever intoxicated.—*State v. Pemberton*, 530.

Same—Instructions—Definition of Crime—Harmless Error.

32. Where the court in other portions of the charge had correctly defined the crime of robbery, its failure to instruct, in a paragraph enumerating the material and necessary allegations in the information which the state was obliged to establish beyond a reasonable doubt, that the property must have been taken from the person or immediate presence of the prosecuting witness, was not prejudicial, in the light of the state's evidence, showing that defendant had assaulted the latter, and, after choking and beating him into insensibility, had taken the property in question from his person.—*State v. Pemberton*, 530.

CROSS-EXAMINATION.

See Evidence, 10, 11, 12, 14, 15, 42.

DAMAGE.**Personal Injuries—Women—Miscarriage—"Injured Feelings"—Not Element of Damage.**

1. While a woman who suffers a miscarriage as a result of physical injury may recover for any mental or physical suffering attendant upon the miscarriage, injured feelings following the miscarriage, not a part of the pain naturally attending it; are too remote to be considered an element of damage.—*Hosty v. Moulton Water Co. et al.*, 310.

DAMAGES.

Comparative,—see Injunction, 4.

Excessive,—see New Trial, 1-3; Verdict, 3, 4.

Loss of earnings,—see Personal Injuries, 33, 34.

Measure of, for breach of agreement to convey real property,—see Real Property, 1, 6, 7.

Personal Injuries—Special Damages—Pleading.

1. Special damages, *i. e.*, damages which are the natural, but not the necessary, result of an injury, must be specifically pleaded.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

DAMS.

See Injunction, 1-6.

DECEIT.

See Contracts, 7.

DEEDS.

Cancellation,—see *Bona Fide Purchaser*, 1, 2.

Reformation—Recordation—Notice—Statute of Limitations.

1. *Held*, that the recording of an instrument sought to be reformed, after the statute of limitations had run, because of a mutual mistake of the parties to it, is not alone sufficient to charge plaintiff with constructive notice of such mistake; but that, in determining the question of notice, either actual or constructive, the recording is to be considered with other facts and circumstances.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

Same—Statute of Limitations—Pleadings—Insufficiency.

2. Defendants, in attempting to plead the statute of limitations, set forth a section of the statute which had no application; they further alleged that the deed had been recorded, that more than five years had elapsed since the date of recordation, and that therefore the action was barred. *Held*, that, conceding (but not deciding) that by pleading "the facts showing the defense," to-wit, the recording of the instrument and the lapse of five years thereafter, the requirements of section 6575, Revised Codes, relative to the pleading of the statute, were met, the facts so stated were insufficient, under the rule announced in paragraph 1 above, to justify the district court in holding plaintiff's cause of action barred.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

Same—Evidence—Nonsuit—Error.

3. Where the evidence adduced by plaintiff in an action to reform a deed was clear, satisfactory and convincing that the instrument as written did not contain the agreement actually entered into by the parties, that there was a mutual mistake as to a material fact, and that such mistake did not result from plaintiff's negligence, the court erred in granting a nonsuit.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

DEFAULT JUDGMENTS.

Setting Aside—Answer—Affidavit of Merits—Inconsistency.

1. The complaint in an action to recover on a claim against an estate, alleged, *inter alia*, that the plaintiff had duly presented her claim to the administrator in writing, supported by affidavit as required by law. The default of the administrator having been entered, defendant, on motion to set aside the default, tendered a proposed answer containing a general denial. In his affidavit of merits he stated that the claim delivered to him had not been verified as prescribed by law and was therefore not a legal claim against the estate. *Held*, that the answer was not so inconsistent with the statements in the affidavit as to warrant the court in refusing to set aside the default.—*Pengelly v. Peeler*, 26.

Same—Discretion—Terms.

2. In setting aside a default judgment, on a showing that defendant's attorney, through mistake and inadvertence, failed to file an answer within the time allowed by law, where the party in default moved promptly to vacate the judgment and appeared to have a good defense to the action, the court did not abuse its discretion; nor did it err in not imposing terms.—*Pengelly v. Peeler*, 26.

Same—When Proper.

3. Plaintiffs commenced an action in a justice's court by filing a complaint. Defendant's answer was an oral denial, and, a trial having resulted in plaintiff's favor, defendant appealed to the district court. When the record was lodged in that court it was found that the complaint had been lost and plaintiffs asked leave to file a substitute. The motion was granted. The only change in the new pleading was an immaterial one in the title of the cause. About nine months thereafter plaintiffs asked that the default of defendant be entered for failure to answer the substituted complaint. A motion to strike defendant's original answer for refusing to sign his deposition was then pending. The default was entered and later set aside on motion. *Held*, that defendant having evidently been misled by plaintiff's conduct, in supposing that the cause stood for trial upon the issues made by defendant's oral denial, the default was properly set aside.—*Hauser et al. v. Newman*, 252.

Same—Abuse of Discretion.

4. *Held*, that the district court abused its discretion in vacating a default judgment on a showing that, while the attorney of the moving party had promised to defend the action, he had failed to file an answer because, being a candidate for public office, he had been so busily engaged in a canvass for votes that he forgot all about the matter.—*Scilley v. Babcock et al.*, 536.

DEFENSES.

Illegality of contract,—see *Contracts*, 5; *Pleading and Practice*, 19, 27, 28.

DEPOSIT.**Principal and Surety—Interest—Evidence.**

1. Where, in an action for interest on a sum deposited in a bank to indemnify defendants against loss as sureties on a *supersedeas* bond, it appeared that a smelting company was indebted to plaintiff, that the sum so due was deposited to the credit of defendants to be held by them until exonerated from liability under the bond, and that the liability was discharged, evidence that neither the company nor its receiver ever claimed any interest on the deposit was admissible as confirmatory of plaintiff's title to the amount on deposit and the interest accruing thereon.—*Leggat v. Palmer*, 302.

Same—Pledge—Interest.

2. A deposit in a bank to indemnify sureties on a bond against possible loss is a pledge within the definition of section 5774, Revised Codes; title to it, as between the principal and the sureties, is in the former, and any interest accruing thereon belongs to him and not to the sureties.—*Leggat v. Palmer*, 302.

Same.

3. Section 6046, Revised Codes, providing that acceptance of payment of the principal waives all claim to interest, has no application to moneys deposited to indemnify sureties on a bond against loss.—*Leggat v. Palmer*, 302.

DESCRIPTIO PERSONAE.
See Negotiable Instruments, 1.

DISCRETION.

Default—Setting Aside—Terms.

1. In setting aside a default judgment on a showing that defendant's attorney, through mistake and inadvertence, failed to file an answer within the time allowed by law, where the party in default moved promptly to vacate the judgment and appeared to have a good defense to the action, the court did not abuse its discretion; nor did it err in not imposing terms.—*Pengelly v. Peeler*, 26.

Expert Witnesses—Competency.

2. It was within the discretion of the trial judge to say whether a witness called as an expert was competent.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

New Trial—Insufficient Evidence.

3. Where, in a boundary dispute, the evidence submitted by plaintiff, upon whom rested the burden of proof, was based chiefly upon conclusions relative to the location of his original stakes, without facts to warrant them, the court did not abuse its discretion in awarding a new trial to defendants.—*Hamilton v. The Monidah Trust et al.*, 269.

Actions—Dismissal—Delay—Burden of Showing Error.

4. A motion to dismiss an action on the ground that plaintiff has, without sufficient excuse, failed to prosecute it to final judgment with reasonable diligence, is addressed to the trial court's discretion, and the burden of showing an abuse of such discretion is upon the movant; therefore, where nothing further appeared in the record than that the motion was made and denied, the supreme court will not interfere.—*State Savings Bank v. Albertson et al.*, 414.

Amendments of Pleadings—Insufficiency of Affidavit.

5. The trial court did not abuse its discretion in refusing defendants permission to amend their answer during trial, where the affidavit filed in support of the application did not negative the idea that the facts alleged in the proposed amendment were within the knowledge of defendants and their counsel from the commencement of suit.—*State Savings Bank v. Albertson et al.*, 414.

Executors and Administrators—Allowance of Attorneys' Fees.

6. Where the record on appeal from an order allowing the sum of \$3,000 to an administrator for attorneys' fees, on a claim of \$21,500, did not contain any testimony as to what the legal services were reasonably worth, the action of the district court cannot be said to have been in abuse of its discretion.—*In re Davis' Estate*, 433.

New Trial—Insufficiency of Evidence—Abuse of.

7. Where a review of the evidence in an action for the breach of an oral contract disclosed that the verdict of the jury in favor of defendants was the only one which could justly have been reached, the trial court abused its discretion in granting a new trial on the ground that the evidence was insufficient to justify the finding.—*Sutton v. Lowry et al.*, 462.

DISMISSAL.

Order of, nonappealable,—see Orders, 2.

Of appeal, defective record,—see Appeal and Error, 6, 7.

Of appeal on technical grounds,—see Appeal and Error, 12.

Actions—Delay—Discretion—Burden of Showing Error.

1. A motion to dismiss an action on the ground that plaintiff has, without sufficient excuse, failed to prosecute it to final judgment with

reasonable diligence, is addressed to the trial court's discretion, and the burden of showing an abuse of such discretion is upon the movant; therefore, where nothing further appeared in the record than that the motion was made and denied, the supreme court will not interfere.—*State Savings Bank v. Albertson et al.*, 414.

Same—Delay—Lapse of Time.

2. Mere lapse of time in prosecuting an action to final judgment is not sufficient to justify a dismissal.—*State Savings Bank v. Albertson et al.*, 414.

DISTRICT COURTS.

See, also, Discretion.

Decision by, time of rendition,—see Judgments, 11.

Rules, construction,—see Rules, 1.

Terms of office of judges,—see Clerk of District Court, 2.

Written opinion of judge not part of record,—see Record on Appeal, 5.

DITCHES.

Across public lands,—see Waters and Water Rights, 1-4.

For placer mining, when exempt from taxation,—see Taxation.

DOMESTIC CORPORATIONS.

See Corporations, 3-5.

DOMESTIC RELATIONS.

See Husband and Wife.

DRAINS.

Injunction—Will not Lie, When.

1. Possible depreciation of farm lands, by reason of the impairment of water rights appurtenant thereto, which may be caused by the laying out of a public drain across them, is not of itself sufficient cause for the issuance of an injunction to prevent its construction. This is an element to be considered in assessing damages to the owner in proceedings had under the drain statute. (*Revised Codes*, secs. 2412 *et seq.*)—*Summers et al. v. Sullivan*, 42.

Statutory Provisions—Failure to Comply with—When Immaterial.

2. In his application to the district court asking the appointment of special commissioners to determine the necessity of a proposed drain and the just compensation to be made for the taking of real property of certain land owners, who would not consent to the release of a right of way or forego the damages which would accrue to them by reason of the construction of the drain, the drain commissioner, among others, described the lands of a certain one of such owners, but failed to set out her name, as required by section 2415, *Revised Codes*. *Held*, that this omission did not render the whole proceeding void.—*Summers et al. v. Sullivan*, 42.

Injunction—Complaint—Insufficiency.

3. Where the complaint of a number of land owners asking an injunction against a drain commissioner to restrain him from proceeding with the establishment of a public drain over their lands, failed to state that a certain one of them was not a party to proceedings had under the drain statute (*Revised Codes*, secs. 2412 *et seq.*), that she was not served with citation, that she did not appear and contest the right of the commissioner to proceed, and that the special commissioners did not hear her and assess and award to her adequate damages, it was insufficient as to her.—*Summers et al. v. Sullivan*, 42.

Married Women—Parties.

4. A married woman having only an inchoate right of dower in her husband's lands over which a right of way for a public drain is sought to be secured under the drain statute need not be made a party to the proceedings.—*Summers et al. v. Sullivan*, 42.

EJECTMENT.

Sufficiency of complaint,—see Pleading and Practice, 12.

ELECTION OF REMEDIES.**Mistake—Effect.**

1. While a party to whom the law furnishes two or more methods of redress in a given case, based upon inconsistent theories, is put to his election, and bound by it if made with full knowledge of the facts, he will not be held to have made an election of remedies if he prosecutes an action based upon a remedial right which he erroneously supposed he had, but did in fact not have, and is defeated because of his error, but may in a new action assert one which he has, even though inconsistent with the one first set up.—*Kaufman v. Cooper et al.*, 146.

Conclusiveness.

2. An election between coexisting remedial rights which are inconsistent, when made with full knowledge of the facts, is irrevocable and conclusive, irrespective of intent, and constitutes a bar to any action based upon a remedial right inconsistent with that asserted by the election.—*Madison River Livestock Co. v. Osler et al.*, 244.

ELECTIONS.

Tie vote,—see Clerk of District Court, 2. 3.

EQUITY.

Restraining collection of judgment, when relief inequitable,—see Judgments, 3.

Findings—Insufficiency of Evidence—Extent of Review.

1. In reviewing an assignment that the evidence is insufficient to warrant the findings in an equity case, the supreme court will go no further than to determine whether there is a decided preponderance in the evidence against them, and if upon examination of the testimony such preponderance is not found, they will not be disturbed.—*Watkins v. Watkins*, 367; *Copper Mt. M. & S. Co. v. Butte etc. Co.*, 487.

Instructions—Review.

2. The findings of the jury in an equity case being advisory only, alleged error in instructions to the jury will not be reviewed.—*Watkins v. Watkins*, 367.

ESTOPPEL.**Taxation—Exemption.**

1. Though the owner of the ditch used for placer mining only had for many years submitted to the payment of taxes thereon upon a valuation fixed by himself (because demanded by the assessor), he was not estopped to question the right of the state to continue to make the unauthorized imposition.—*Hale v. County of Jefferson et al.*, 137.

Judgment—Res Adjudicata.

2. Where plaintiff in a claim and delivery action, in which he was defeated, had not made any assertion that defendants were indebted to him, although they admitted that they owed him a certain amount, the matter of their indebtedness to him could not have been litigated, and

he was therefore not estopped from thereafter in a separate action to assert such indebtedness.—*Kaufman v. Cooper et al.*, 146.

Law of the Case.

3. Where at the first trial of a cause counsel for both parties proceeded upon a certain theory touching the meaning of the terms of an insurance policy, and on appeal the question of its proper construction was not raised in or considered by the appellate court, its decision cannot be said to be the law of the case on such point, and plaintiff was, therefore, not estopped to contend for a different construction on the second trial.—*McAuley v. Casualty Co.*, 185.

Cities and Towns—Streets—Building Permits.

4. Where a city had acquired an easement in public land for street purposes prior to the taking of such land by defendant, it could not be estopped to assert its right by the acts of its building inspector in issuing building permits to defendant, relying on which he claimed to have made valuable improvements on the land, and evidence to that effect was properly excluded.—*City of Butte v. Mikosowitz*, 350.

Pleading—Evidence—Admissibility.

5. Unless an estoppel is properly pleaded, evidence of acts constituting it is inadmissible.—*City of Butte v. Mikosowitz*, 350.

Availability of Defense Against Public.

6. *Quære*: Is the defense of estoppel available as against the public or a municipality?—*City of Butte v. Mikosowitz*, 350.

EVIDENCE.

Promissory Notes—Agency—Intention of Parties—Ambiguity—Parol Testimony—Admissibility.

1. In an action to recover on a promissory note, signed by defendant and others with the word "Trustees" added to their signatures, defendant denied that he ever received any consideration for the note, and alleged that it had been executed by him as trustee of a mining company and not in his individual capacity, that the consideration expressed in it was received and enjoyed solely by the company, and that it was so understood between defendant and the payee of the note at the time of its execution and delivery. At the trial the court, over objection of plaintiff, permitted defendant to introduce parol testimony in support of the affirmative allegations of the answer. *Held*, that the court's action was correct, the rule being, in such cases as this, that where a note is so ambiguous on its face as to leave it in doubt who is bound by it, parol testimony is admissible to solve the question.—*Knippenberg v. Greenwood M. & M. Co. et al.*, 11.

Hearsay Testimony—Harmless Error.

2. The statements of a bank officer, who testified in an action in replevin, partly from personal knowledge as to transactions between the parties, partly from statements made to him by them, and partly from knowledge obtained by cashing checks covering the transactions, could not be said to have been strictly hearsay, and an order refusing to strike such testimony did not constitute reversible error, especially where from other evidence it appeared that plaintiff could not have suffered prejudice from the ruling.—*Ettien v. Drum*, 34.

Circumstantial—Sufficiency—Review.

3. Where the evidence in an action in claim and delivery was almost wholly circumstantial and in such a condition that the mind was left in doubt as to the justness of plaintiff's claim, upon whom was the burden of proof, a verdict in favor of defendant will not be disturbed on appeal under an assignment that it is not supported by the testimony.—*Ettien v. Drum*, 34.

Witnesses—Evidence on Former Trial—Admissibility.

4. The testimony of a witness, given at a former trial in an action between the same parties and relating to the same subject matter, who was out of the jurisdiction at the time of the second trial, was competent.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Objection not Made in District Court—Review.

5. An objection to the introduction of testimony not made in the district court cannot be raised for the first time on appeal.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124; *Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Witnesses—Administering of Oath—Presumptions.

6. Where it appeared that a witness in a justice's court, in an action subsequently appealed to the district court, had been examined and cross-examined at length, the presumption attaches that the justice regularly performed his official duties and administered the oath to the witness before permitting him to testify.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Sales—Quality of Article Sold—Admissibility.

7. On an issue whether whisky was of the brand and quality ordered, the defendant buyer was properly permitted to show that the barrels containing it were received by him in apparently the same condition as when shipped, and that they had not been tampered with after being stored in his cellar or their contents adulterated.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Same—Action for Price—General Denial—Evidence Admissible.

8. In an action for the price of goods to be shipped on order, proof that the plaintiff failed to ship goods of the quality ordered is admissible under a general denial.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Insolvency—Admissibility.

9. The court erred in refusing to permit defendants to introduce proof that plaintiff, seeking to enjoin the collection of a judgment, was insolvent when he made an offer to pay a balance in favor of defendants. *Kaufman v. Cooper et al.*, 146.

Criminal Law—Cross-examination—Witnesses—Degrading Character.

10. The court erred in overruling objections of defendant, charged with crime, to questions asked his (defendant's) brother by the county attorney, on cross-examination, whether he was the same Pat Crowe who had been connected with the Cudahy kidnaping, and whether he had not been more or less directly implicated in other offenses of like character. The questions had a tendency to degrade and discredit the witness. (MR. JUSTICE SMITH dissenting.)—*State v. Crowe*, 174.

Same.

11-12. It was also error to permit the witness above referred to, to be asked on cross-examination whether he knew of his brother, the defendant, ever having been involved in difficulty or been defendant in a criminal proceeding before.—*State v. Crowe*, 174.

Same—Insanity Preceding Offense—Admissibility of Evidence—Discretion.

13. Where the defense relied on by one charged with crime is insanity, the length of time preceding the offense to which inquiry relative to defendant's mental condition may be directed is a matter addressed to the sound legal discretion of the trial judge, subject to review for abuse of such discretion only.—*State v. Crowe*, 174.

Same—Insanity—Cross-examination.

14. A lay witness having testified that in his opinion defendant was of unsound mind at the time the offense charged was committed, it was proper to ask him on cross-examination whether he thought defendant

had sufficient mental capacity to distinguish between right and wrong and would know that it was wrong to shoot a man, or steal or commit burglary.—*State v. Crowe*, 174.

Same—Opinion Evidence.

15. The witness mentioned in paragraph 14, above, having answered the question in the affirmative, he should have been allowed on redirect examination to give his opinion as to whether defendant, if he knew it was wrong to do the things enumerated, had sufficient mental capacity to do right and avoid wrong; since defendant could not have anticipated the extent of the cross-examination, and therefore could not, in his direct examination, cover every possible phase of insanity which might be opened to inquiry.—*State v. Crowe*, 174.

Same—Insanity—Irresistible Impulse.

16. Where defendant on trial for crime relies on the defense of insanity, the question of irresistible impulse is a proper subject of inquiry.—*State v. Crowe*, 174.

Hypothetical Questions—Contents.

17. A hypothetical question to an expert need not embody all the testimony on the subject to which it relates.—*State v. Crowe*, 174; *McAuley v. Casualty Co.*, 185.

Same—Expert Testimony—Form of Question.

18. The hypothetical question: "If deceased died from erysipelas, what relation, in your opinion, as a physician and surgeon, did the scratch or abrasion have to her death?" to which the answer was: "It served as a point of entrance into the system of the germ of erysipelas"—was not objectionable as calling for the ultimate conclusion to be reached by the jury, to-wit, whether the injury which produced the abrasion, was the direct and proximate cause of the woman's death. *McAuley v. Casualty Co.*, 185.

Hearsay—Harmless Error.

19. Plaintiff, the husband of deceased, having testified that he saw she was injured in alighting from a street-car, the admission of a statement by her, made to him at the time, that she had been hurt, was not prejudicial error.—*McAuley v. Casualty Co.*, 185.

Expert Witnesses—Competency—Discretion.

20. It was within the discretion of the trial judge to say whether a witness called as an expert was competent.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Personal Injuries—Earning Capacity—Opinion Evidence.

21. A witness who testified that he had known deceased for twenty years and had himself for thirty-five years conducted a similar business to that carried on by the latter, that he had done a great deal of business with deceased, and that the latter's capacity as a business man was first class, that he was a good mechanic, kept his own books, etc., and that in his judgment his earning capacity prior to his death was \$5,000 a year, was qualified to express an opinion as to the value of deceased's services to his business.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Degree of Proof—Moral Certainty—Statutes.

22. The provision of section 7847, Revised Codes, that moral certainty, or that degree of proof which produces conviction in an unprejudiced mind, is all that is required, *held* applicable to criminal causes.—*State v. Powers*, 259.

Value—Expert Testimony.

23. An expert on precious stones was properly allowed to give an opinion as to the value of a ring, based upon its description and a comparison of it with a similar one exhibited to the jury.—*Sullivan v. Girson et al.*, 274.

Claim and Delivery—Present Possession by Defendant—Evidence.

24. Evidence which showed that defendants, engaged in the pawn-broking business, admitted that they had a ring which was the subject matter of a suit in replevin, on the day before suit and on the day action was begun but before it was actually brought, *held* sufficient to have made out a *prima facie* case of the present actual possession by defendants at the time the action was commenced.—*Sullivan v. Girson et al.*, 274.

Same—Opinion Evidence—Value.

25. A witness who had purchased a ring about two and one-half years prior to the time it became the subject of an action in claim and delivery, and who testified that he had frequently priced and purchased precious stones in different cities and knew what stones of the size and quality of those in the ring were selling for in the city in which the controversy arose, was competent to estimate its value, even though he had not qualified as an expert.—*Sullivan v. Girson et al.*, 274.

Value—Secondary Evidence—When Proper.

26. *Semble*: It would seem that, after refusing to produce a ring sought to be recovered in an action in claim and delivery, for inspection by witnesses and jury, and thus rendering it impossible for plaintiff to present the best evidence of its value, defendants ought not to be heard to complain that the best evidence was not produced upon that question.—*Sullivan v. Girson et al.*, 274.

Erroneous Admission—Harmless Error.

27. Error in permitting plaintiff to testify as to what he meant by a letter written by him to defendant and introduced in evidence, was harmless, where the witness was unable to say what he meant and where his statement was more to his prejudice than to his advantage.—*Dreeland v. Pascoe*, 290.

Cancellation of Deed—Evidence—Sufficiency.

28. Evidence, in an action to set aside a conveyance of real property alleged to have been made by plaintiff's agent in breach of his trust, *held* sufficient to support the court's decision in favor of plaintiff.—*Foster et al. v. Winstanley et al.*, 314.

Letters—Admissibility.

29. In an action to quiet title to certain real property, claimed by defendant to have been donated to it by a foreign brewing company, letters written by the latter to defendant's predecessor and answers thereto, which showed, in connection with other testimony, that the company bought and paid for the land and the building thereon, were admissible.—*Uihlein v. Caplice Commercial Co.*, 327.

Personal Injuries—Contractors—Subcontractors—Liability—Evidence—Insufficiency.

30. In an action against a contractor and a subcontractor for injuries to a member of a railroad construction crew, evidence *held* insufficient to show that plaintiff was employed by the former.—*Winnicott v. Orman et al.*, 339.

Estoppel—Pleading.

31. Unless an estoppel is properly pleaded, evidence of acts constituting it is inadmissible.—*City of Butte v. Mikosowitz*, 350.

Admissibility—Quieting Title.

32. In a suit to quiet title to land alleged to have been conveyed by defendant to his divorced wife, proof as to who paid the taxes on the property after the alleged conveyance, claimed by defendant to have been a forgery, was competent as tending to show the reasonableness or unreasonableness of plaintiff's claim.—*Watkins v. Watkins*, 367.

Same.

33. Defendant in the suit referred to in the foregoing paragraph was properly permitted to answer the question why he made an application to reduce the amount of alimony awarded his wife. The testimony was competent as tending to show the feelings existing between the parties prior to and at the date of conveyance, and the probability or improbability of the transfer by defendant of all his property to plaintiff. *Watkins v. Watkins*, 367.

Same—Hearsay.

34. Testimony of third persons as to what an employee of defendant had said concerning certain checks introduced in evidence, was inadmissible as hearsay.—*Watkins v. Watkins*, 367.

Admission of Fact Presumed—Not Error.

35. Error cannot be predicated upon the admission of evidence to establish a fact which may be presumed to exist.—*Golden v. Northern Pacific Ry. Co.*, 435.

Railroads—Ejecting Trespassers—Evidence—Sufficiency.

36. Evidence, in an action against a railway company for injuries caused to plaintiff in being ejected from a freight train by one of defendant's brakemen, *held* sufficient to go to the jury on the question of the identity of the person who ejected plaintiff.—*Golden v. Northern Pacific Ry. Co.*, 435.

New Trial—Misconduct of Jurors—Affidavits—Hearsay.

37. Affidavits based upon matters of hearsay or upon information and belief are incompetent to show misconduct of jurors.—*Sutton v. Lowry et al.*, 462.

Same—Affidavits—Insufficiency.

38. Affidavits reciting that a juror had certain amounts of money immediately after the trial of a cause, a retrial of which was sought on the ground of misconduct of jurors, were insufficient, where affiants disclaimed any knowledge of the source from which such money was received.—*Sutton v. Lowry et al.*, 462.

Same—Affidavits—Immateriality.

39. A record of a contempt proceeding against a juror relating to matters which occurred subsequent to, and were not in any manner connected with, the cause of which a new trial was asked because of misconduct of such juror, was immaterial, and therefore properly excluded.—*Sutton v. Lowry et al.*, 462.

Criminal Law—Expert Testimony—Admissibility.

40. The testimony of persons for many years engaged in the livestock business, that in their opinion the flesh of the cattle found concealed on the range, and with the larceny of which defendants stood charged, was that of animals killed and properly bled, was properly admitted, under section 7887, Revised Codes.—*State v. Keeland et al.*, 506.

Directed Verdict—Plaintiff's Evidence—Truth of, to be Assumed.

41. On motion for a directed verdict, the truth of the evidence tending to support plaintiff's case is to be assumed, and such evidence must be regarded in the light most favorable to him.—*Moran et al. v. Ebey*, 517.

Cross-examination.

42. Defendant's wife, after having testified in his behalf, was asked on cross-examination to identify certain letters written by her as his agent. The letters disclosed the fact that defendant knew that his land, which he had agreed to convey to plaintiff, had been sold by his agent prior to the date of his agreement with plaintiff. *Held*, that the letters were properly admitted on cross-examination.—*Ross v. Saylor*, 559.

Real Property—Failure to Convey—Bad Faith—Admissibility.

43. Where plaintiff sought to recover damages because of defendant's failure to carry out an oral agreement to convey to him an estate in certain lands in Nebraska, represented by certificates which entitled the holder to the land therein named, and which had been assigned to plaintiff in exchange for land owned by him in this state, but which Nebraska lands had theretofore been sold by defendant's agent to another, evidence that defendant had told plaintiff that the title to the land in Nebraska was clear, was admissible to show the bad faith of defendant in the transaction.—*Ross v. Saylor*, 559.

Personal Injuries—Loss of Earnings—Pleading and Proof.

44. *Quære*: May plaintiff in a personal injury action prove loss of earnings without specifically alleging the fact of such loss?—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

EXCEPTIONS.

See Instructions, 9; Bills of Exceptions.

EXCESSIVE DAMAGES.

See New Trial, 1-3, 6; Verdict, 3, 4.

EXECUTORS AND ADMINISTRATORS.**Allowance of Attorneys' Fees—Discretion.**

1. Where the record on appeal from an order allowing the sum of \$3,000 to an administrator for attorneys' fees, on a claim for \$21,500, did not contain any testimony as to what the legal services were reasonably worth, the action of the district court cannot be said to have been in abuse of its discretion.—*In re Davis' Estate*, 433.

Attorneys' Fees—Apportionment of Amounts Allowed.

2. Where the sole question before the district court was what reasonable amount should be allowed to an administrator for attorneys' fees rendered to the estate represented by him, the court was not required to apportion the amount awarded, among the different attorneys who performed the services.—*In re Davis' Estate*, 433.

EXPERT TESTIMONY.

See Evidence, 17, 18, 20, 23, 40.

FINAL ORDERS.

See Orders, 1, 2.

FINDINGS.

1. General, include what,—see Claim and Delivery, 5.
2. Sufficiency,—see Injunction, 1.
3. Of district judge, time of rendition,—see Judgments, 11.
4. Of jury on conflicting evidence, conclusiveness,—see Personal Injuries, 12.
5. Review in equity cases,—see Equity, 1.

Finding Favorable to Appellant—Right to Complain.

1. A finding in favor of defendant on his counterclaim "and against the plaintiff, for the sum of no dollars," was in the latter's favor, of which he will not be heard to complain.—*Sutton v. Lowry et al.*, 462.

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INDEBTEDNESS.**FOREIGN CORPORATIONS.**

See Corporations, 1.

FORFEITURES.

See Waters and Water Rights, 4; Mines and Mining, 5, 6.

GAME WARDEN.

Deputies,—see Office and Officers, 2.

HARMLESS ERROR.

1. Admission of evidence,—see Evidence, 2, 19, 27.
2. Assumption of fact,—see Instructions, 10.
3. Exclusion of evidence,—see Injunction, 2.
4. Instructions,—see Instructions, 10, 12, 14, 15.
5. Submitting question of law to jury,—see Instructions, 12.

HEALTH.

See State Board of Health.

HEARSAY TESTIMONY.

See Evidence, 2, 19, 34.

HIGHWAYS.

See Municipal Corporations, 15-20.

HOMICIDE.

See Criminal Law, 17-21.

HUSBAND AND WIFE.

Quieting Title—Evidence—Admissibility.

1. In a suit to quiet title to lands alleged to have been conveyed by defendant to his divorced wife, proof as to who paid the taxes on the property after the alleged conveyance, claimed by defendant to have been a forgery, was competent as tending to show the reasonableness or unreasonableness of plaintiff's claim.—*Watkins v. Watkins*, 367.

Same.

2. Defendant in the suit referred to in the above paragraph was properly permitted to answer the question why he made an application to reduce the amount of alimony awarded his wife. The testimony was competent as tending to show the feelings existing between the parties prior to and at the date of conveyance, and the probability or improbability of the transfer by defendant of all his property to plaintiff. *Watkins v. Watkins*, 367.

HYPOTHETICAL QUESTIONS.

See Evidence, 17, 18.

IDENTITY.

See Evidence, 36.

INDEBTEDNESS.

See Counties, 1-3; Municipal Corporations, 1-14.

INFORMATION.

Charging murder, sufficiency,—see Criminal Law, 21.

Charging robbery, sufficiency,—see Criminal Law, 27, 28.

Defects, when waived,—see Criminal Law, 29.

INJUNCTION.

See, also, Drains, 1, 3.

Restraining collection of judgment,—see Judgments, 2.

Power Dams—Nuisances—Findings—Evidence—Sufficiency.

1. In a suit for a mandatory injunction to compel defendant power company to lower its dam so as to avoid flooding plaintiff's lands lying above it, and for damages, *Held*, that the findings of the court in favor of plaintiff were not based upon a "mathematical impossibility," but were supported by substantial testimony and, therefore, ought not to be disturbed on appeal.—*Wilhite v. Billings & E. Mont. Power Co.*, 1.

Same—Offer of Proof—Exclusion—Harmless Error.

2. Alleged error in excluding defendant company's offered proof that the plaintiff's lands had not netted to him in any one year the sum of \$801, was harmless, where he had not claimed any damages on account of impairment of the rental value of his premises, and where the finding of the jury that such value had been decreased by the construction and maintenance of the dam, if pertinent, was probably only material to the question whether the injunction should issue, and where the damages which were awarded (\$200) could all be attributed to specific losses testified to by plaintiff.—*Wilhite v. Billings & E. Mont. Power Co.*, 1.

Same—Notice Before Suit.

3. Defendant power company was chargeable with knowledge of whatever conditions resulted from the construction and maintenance of its dam, and could, therefore, not complain of the failure of plaintiff to give it notice that he had been injured by the overflowing waters and submit an itemized statement of his damages, before commencing suit.—*Wilhite v. Billings & E. Mont. Power Co.*, 1.

Same—Comparative Damages—Evidence.

4. The record not disclosing any evidence that defendant company was a public service corporation or that it was actually operating any part of its plant, but showing that the dam was in course of construction for over twenty years, and that numerous mistakes had been made and difficulties encountered during its erection, defendant's offer to prove that it cost \$120,000 to build was properly excluded, since, under these circumstances, the magnitude of defendant's interest was not apparent, so as to make applicable the rule that injunction will not issue in view of the great damage that would result to defendant and others dependent upon its operations, and the comparatively small injury caused to plaintiff by the maintenance of the dam.—*Wilhite v. Billings & E. Mont. Power Co.*, 1.

Same—Not Nuisance *per se*.

5. The finding of the court that the dam in question was a nuisance *per se*, disapproved.—*Wilhite v. Billings & E. Mont. Power Co.*, 1.

Same—Scope of Order.

6. Where the evidence did not show that it was necessary to rebuild, repair or remove defendant power company's dam in order to prevent the flooding of plaintiff's lands, an order of the court to that effect was too broad. All plaintiff was entitled to was a decree that defendant abate the nuisance and refrain from causing him injury in the

future, and that, to attain this result, it employ the necessary and requisite means.—*Wilbrite v. Billings & E. Mont. Power Co.*, 1.

Ditches—Quieting Title—Decree—Injunctive Relief—When Proper.

7. Where, in an action to quiet title to a right of way for an irrigation ditch, the court found that the ditch and right of way therefor were the property of plaintiff and that defendant had wrongfully interfered therewith, it did not err in incorporating in its decree an order restraining defendant from further interference. Plaintiff was entitled to complete relief.—*Cottonwood Ditch Co. v. Thom*, 115.

INNOCENT PURCHASER.

See Claim and Delivery, 2.

INSANITY.

See Criminal Law, 3, 12, 31.

INSOLVENCY.

See Evidence, 9.

INSTRUCTIONS.

See, also, Criminal Law, 17-20.

Verdict Contrary to Law.

1. A verdict cannot be said to be contrary to the law as declared by the court, where under its instructions the jury could have found the issue for either party.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Criminal Law—Insanity—Instructions—Burden of Proof.

2. In instructing the jury in a criminal action that the defense of insanity "is to be weighed fully and justly, and, *when satisfactorily established*, must recommend itself" to their favorable consideration, etc., the court impliedly cast the burden of satisfactorily establishing that defense upon the defendant, and therefore committed error. (*MR. JUSTICE SMITH* dissenting.)—*State v. Crowe*, 174.

Same—Insanity—Disparagement of Defense by Court—Erroneous Instruction.

3. It was also error to instruct that the jury should examine the defense of insanity "with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt." The defendant is entitled to make any defense recognized by the law and have it submitted without disparagement by the court. (*MR. JUSTICE SMITH* dissenting.)—*State v. Crowe*, 174.

Same—Insanity—Instructions—Burden of Proof.

4. An instruction that, before the jury could acquit upon the ground of insanity, they must find defendant was laboring under such a defect of reason from disease of the mind as to not know—that is, as not to have sufficient mental capacity to know—the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong, and one which declared that, before acquittal could be had on that ground, it must appear that defendant was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment, while not inconsistent when viewed in the light of the whole charge, were so vague in language that the jury might reasonably have inferred from them that defendant had the burden of establishing his insanity.—*State v. Crowe*, 174.

Same—Insanity—Reasonable Doubt.

5. The court further erred in charging the jury that it was for them to say whether the evidence, as a whole, convinced them of defendant's insanity, or raised in their minds a reasonable doubt on the subject. The instruction was objectionable because couched in the alternative. The only matter which should have been submitted for their determination was whether the evidence as a whole raised a reasonable doubt of defendant's sanity.—*State v. Crowe*, 174.

Theory of Case.

6. Where a cause is tried upon a certain theory, the losing party cannot on appeal complain of an instruction covering such theory.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Street Railways—Personal Injuries—Proper Refusal of Instruction.

7. An action against a street railway company having been tried upon the theory that negligence in the management of its car could properly be predicated upon the failure of its motorman to exercise reasonable care after deceased was discovered in a situation of peril, a requested instruction which would have authorized the jury to find for defendant, regardless of the conduct of the motorman after he discovered deceased in a place of danger, was properly refused.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Willful Conduct of Defendant—Proper Refusal.

8. A requested instruction that plaintiff could not recover, even though defendant company was negligent in running its car and deceased was in no respect negligent, unless its conduct in managing the car was willful and reckless, was properly refused where the allegation of willfulness and recklessness in the complaint was not of the gravamen of the pleading, where no evidence had been introduced in support of it, and where there was evidence sufficient to warrant recovery aside from the question of willfulness and recklessness.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Objections—Exceptions—Review.

9. Under section 6746, Revised Codes, the supreme court may not consider an assignment of error based upon the giving or refusal of an instruction unless proper objection was made to the instruction proposed to be given and exceptions saved to the rulings of the trial court.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Assumption of Fact—Harmless Error.

10. Though an instruction that both plaintiff and defendant derived title to ground in controversy between a city and defendant, from the government, was erroneous as an assumption of a fact in dispute, the error was harmless where in subsequent portions of the charge the jury was given to understand that both parties "claimed" title from the same source.—*City of Butte v. Mikosowitz*, 350.

Equity Cases—Review.

11. The findings of the jury in an equity case being advisory only, alleged error in instructions to the jury will not be reviewed.—*Watkins v. Watkins*, 367.

Railroads—Ejecting Trespassers—Submitting Questions of Law—Harmless Error.

12. Plaintiff having testified that, while riding on top of a freight-car, defendant's brakeman forced him, under threats of violence, to jump from the moving train, and the court in other portions of its charge having assumed, with defendant's acquiescence, that the brakeman's conduct was unlawful, an instruction that if plaintiff was on top of the car he was a trespasser, and that defendant could prevent such trespass "by lawful means," could not have been prejudicial to de-

fendant as leaving the question of law, what constituted the lawful means defendant's employees could resort to in ejecting trespassers, to be answered by the jury.—*Golden v. Northern Pacific Ry. Co.*, 435.

Refusal—When not Error.

13. The refusal of requested instructions was not error, where the ones given covered those refused.—*State v. Keeland et al.*, 506.

Robbery—Definition of Crime—Harmless Error.

14. Where the court in other portions of the charge had correctly defined the crime of robbery, its failure to instruct, in a paragraph enumerating the material and necessary allegations in the information which the state was obliged to establish beyond a reasonable doubt, that the property must have been taken from the person or immediate presence of the prosecuting witness, was not prejudicial, in the light of the state's evidence, showing that defendant had assaulted the latter and, after choking and beating him into insensibility, had taken the property in question from his person.—*State v. Pemberton*, 530.

Inapplicability—Harmless Error.

15. The giving of an instruction on the measure of damages, which, though inapplicable to the case as tried, could not have added anything to the measure of relief to which plaintiff was clearly entitled, was not sufficient to work a reversal of a judgment in his favor, nothing appearing that a different result could be reached on a retrial.—*Boss v. Saylor*, 559.

INSURANCE POLICIES.

See *Life and Accident Insurance*.

INTEREST.

See, also, *Deposit*, 1, 2.

Definition.

1. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned.—*Carlson v. City of Helena*, 82.

Mortgages—Redemption.

2. After decree in a foreclosure suit the mortgage debt became merged in the judgment, and in a subsequent action, looking to the redemption of the property, interest was properly allowed at eight per cent per annum. (Revised Codes, sec. 5214.)—*Toole v. Weirick et al.*, 359.

IRREGULARITIES.

See *Waiver*, 1.

JOINT RESOLUTIONS.

See *Legislature*.

JUDGMENTS.

By default,—see *Default Judgments*.

Labor Organizations—Judgment Against President—Error.

1. Held, that a judgment against defendant personally, who was sued as president of a labor organization by a member of it to recover certain pecuniary benefits which he alleged he was entitled to from the association, was not supported by the complaint which neither stated a cause of action against him individually nor in his official capacity.—*Vance v. McGinley*, 46.

Restraining Enforcement—Pleadings—Tender.

2. In an action to enjoin the enforcement of a judgment against him amounting to over \$7,000, plaintiff alleged, *inter alia*, that defendants were indebted to him in a sum in excess of \$5,000 and insolvent, and that he was willing and ready to pay the balance of the judgment in favor of defendants. The court issued an order granting an injunction *pendente lite*. *Held*, that for failing to make a tender of the amount admittedly due to defendants, the complaint did not state facts sufficient to entitle plaintiff to the relief granted.—*Kaufman v. Cooper et al.*, 146.

Same—Inequitable Relief.

3. The order of the court in restraining defendants from receiving from plaintiff the balance admittedly due them unless they consented to his obtaining a judgment against them for the amount of his claim, was tantamount to requiring them to waive any defense they might have, and therefore inequitable.—*Kaufman v. Cooper et al.*, 146.

Same—Insolvency—Evidence—Admissibility.

4. The court erred in refusing to permit defendants to introduce proof that plaintiff when making the offer referred to in paragraph 2 above, that he was ready and willing to pay the balance due them, was insolvent.—*Kaufman v. Cooper et al.*, 146.

Same—Defenses—Attorneys' Liens—Who may Assert.

5. An attorney's lien upon a judgment, the enforcement of which is sought to be enjoined, can only be asserted by the attorney himself and not by the party against whom the injunction is asked.—*Kaufman v. Cooper et al.*, 146.

Res Adjudicata—Estoppel.

6. Where plaintiff in a claim and delivery action, in which he was defeated, had not made any assertion that defendants were indebted to him, although they admitted that they owed him a certain amount, the matter of their indebtedness to him could not have been litigated, and he was therefore not estopped from thereafter in a separate action to assert such indebtedness.—*Kaufman v. Cooper et al.*, 146.

Costs—Insertion in Judgment—Ministerial Duty of Clerk.

7. The clerk of the district court in carrying out the provisions of section 7173, Revised Codes, relative to the insertion of costs in the judgment where the same have been taxed or ascertained, acts in a ministerial capacity.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Same—Allowance—When Error.

8. It was error to allow costs where no showing had been made to the court that the successful party had claimed them, as provided in section 7170, Revised Codes.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Same—Adding to Judgment After Appeal—Error.

9. After an appeal has been perfected, the district court is without jurisdiction to amend the judgment by adding a provision that the successful party recover his costs.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Complaint—Prayer, No Part of—Amendments.

10. The prayer is no part of the complaint and cannot be looked to to find support for the judgment; hence, the allowance of an amendment to the prayer asking for a larger sum than could be found due under the allegations of the complaint did not authorize judgment for the greater amount.—*Leggat v. Palmer*, 302.

Trial by Court—Decision—Time of Rendition—Directory Statute.

11. Section 6763, Revised Codes, providing that upon a trial of a question of fact by the court, its decision or findings must be filed within twenty days after submission of the case, is directory only, and its failure to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date.—*Toole v. Weirick et al.*, 359.

JUDICIAL NOTICE.**Laws of Nature.**

1. While courts may take judicial notice of the fact that destruction of the sight of one eye impairs the power of vision, they may not assume, without proof, that such destruction necessarily affects the sight of the other eye injuriously.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

JURISDICTION.

See, also, Court, 2; Supreme Court, 5; Justices of the Peace, 2.

Certiorari—Error Within Jurisdiction.

1. Error within jurisdiction is not reviewable on *certiorari*.—*State ex rel. Gattan v. District Court*, 134.

Amendment of Record on Appeal, by District Court.

2. After an appeal has been perfected, the district court is without jurisdiction to amend the judgment by adding costs.—*Butte Northern Copper Co. v. Radmilovich*, 157.

JURY.

See, also, Verdict.

Misconduct,—see New Trial, 14-17.**Drawing Jurors—Challenge to Panel.**

1. The fact that two judges of a district court, divided into departments, sat together when an order for the drawing of jurors for their departments was made, is not ground for challenge to the panel.—*State v. Powers*, 259.

Same—Judicial Authority—Delegation—Challenge to Panel—Presumptions.

2. The court in making the order above referred to appointed three members of the bar to supervise the drawing of jurors. The record on appeal did not disclose that during the drawing the attorneys thus appointed attempted to exercise any judicial functions. *Held*, that the court's action did not constitute a valid ground for challenge to the panel as a delegation of judicial power. The presumption obtains that the judges and clerk did their duty.—*State v. Powers*, 259.

Same—Names—Clerical Errors—Challenge to Panel.

3. Where "M. Meyer" responded to a summons to jury duty, and the original juror's slip bore his proper name and place of residence, the fact that the venire contained the name of "F. Meyer" and the sheriff's return showed that "Ed. Meyer" had been served was not ground for challenge to the panel. The names of "F. Meyer" and "Ed. Meyer" *held* to have been clerical errors.—*State v. Powers*, 259.

JUSTICES OF THE PEACE.**Complaint—Sufficiency—Copy of Account.**

1. *Held*, that the complaint, in an action brought in a justice's court to recover the balance of an account for goods, wares and merchandise, reading as follows: "E. to M. & W. Dr. To balance for merchandise (describing it), \$255.12," was sufficient under sections 7005 and 7007, Revised Codes; *held*, further, that the word "account," as used in the latter section in declaring that a complaint in a justice's

court may, *inter alia*, be "a copy of the account," does not mean a list of different items constituting it.—*Moran et al. v. Ebey*, 517.

Jurisdiction—Slander.

2. Under section 66, Code of Civil Procedure, 1895, a justice of the peace court had jurisdiction of an action for slander, commenced prior to the amendment of said section (Laws 1907, p. 186), where the damages claimed did not exceed \$300.—*McKenzie v. Doran et al.*, 593.

LABOR UNIONS.

Actions against,—see Associations, 1, 2.

LACHES.

Equity—Statute of Limitations.

1. *Obiter*: Defendant in an equity case may avail himself of the laches of plaintiff, notwithstanding the statute of limitations has not expired, or in cases where he has neglected to plead the statute or elected not to do so.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

LARCENY.

See Criminal Law, 22-26.

LAUNDRIES.

Licenses,—see Constitution, 2-5.

LAW OF THE CASE.

See Estoppel, 3.

LEGISLATURE.

Force of joint resolution,—see Statutes and Statutory Construction, 8.

Legislative Procedure—Enrolled Bill—Conclusiveness.

1. An enrolled bill, bearing the signatures of the presiding officers of the two Houses and the approval of the governor, is conclusive upon the courts, and, in determining whether an Act has been properly passed, recourse may not be had to any other evidence, except where the alleged invalidity of an Act is based upon a failure to enter the names of those voting upon its final passage, in which case the journals may be consulted.—*State ex rel. Gregg et al. v. Erickson et al.*, 280.

Wisdom of Legislation—Courts may not Inquire into.

2. Courts may not inquire into the wisdom of legislative enactments. *Monson v. La France Copper Co.*, 50.

LIENS.

Attorneys' liens, who may assert,—see Attorneys, 1.

LIFE AND ACCIDENT INSURANCE.

Policies—Ambiguity—Construction.

1. Where the terms of a life and accident insurance policy are so ambiguous and involved as to be almost unintelligible, they should be liberally construed in favor of the insured.—*McAuley v. Casualty Company*, 185.

Law of the Case—Estoppel.

2. Where at the first trial of a cause counsel for both parties proceeded upon a certain theory touching the meaning of the terms of an insurance policy, and on appeal the question of its proper construction was not raised in or considered by the appellate court, its decision cannot be said to be the law of the case on such point, and plaintiff

was, therefore, not estopped to contend for a different construction on the second trial.—*McAuley v. Casualty Company*, 185.

Proximate Cause of Death—Evidence—Sufficiency.

3. In an action on a life and accident insurance policy under the terms of which the beneficiary was to be indemnified in case the assured, while riding as a passenger on a street-car, was injured and should die in consequence of such injury, evidence which showed that the assured injured her leg while alighting from a car and died from erysipelas, which disease experts testified could only be introduced into the system through an abrasion of the skin, was, in the absence of any testimony that the disease had been communicated through any other means, sufficient to show that the injury to her limb was the proximate cause of her death.—*McAuley v. Casualty Company*, 185.

Passengers—Evidence—Sufficiency.

4. Although there was no direct testimony that the deceased was a passenger on the car in alighting from which she was injured, evidence that it stopped at her home and she alighted, sufficiently showed that fact, nothing appearing that it stopped for any other purpose.—*McAuley v. Casualty Company*, 185.

Proof of Death—Mailing—Presumptions.

5. Where proof of death was mailed to the home office of defendant insurance company at New York by registered letter, the presumption obtains that it was received in due course of mail.—*McAuley v. Casualty Company*, 185.

Pleadings—Amendment at Trial.

6. Plaintiff, in an action on an insurance policy, was properly allowed to amend his complaint at the trial by the allegation that "he had duly performed each and all of the obligations in said contract on him binding."—*McAuley v. Casualty Company*, 185.

Pleadings—Amendments at Trial—Relation Back.

7. An insurance policy provided that unless action upon it was commenced within six months after it accrued, it should be barred. Assured died October 24, 1906, and the beneficiary commenced suit on April 24, 1907. At the trial, on October 23, 1907, he was permitted to amend his complaint by inserting that he had duly performed all obligations made binding upon him in the contract. *Held*, under *Clark v. Oregon Short Line R. R. Co.*, 38 Mont. 177, that the original pleading was sufficiently substantial to permit of its being amended so as to fully state the same cause of action attempted to be stated in the first instance; that the amendment related back to the date at which the complaint was filed, and that therefore the contention that the action was barred because the complaint never stated a cause of action until after amendment, had no merit.—*McAuley v. Casualty Company*, 185.

Evidence—Hearsay—Harmless Error.

8. Plaintiff, the husband of deceased, having testified that he saw she was injured in alighting from the car, the admission of a statement by her, made to him at the time, that she had been hurt, was not prejudicial error.—*McAuley v. Casualty Company*, 185.

Expert Evidence—Hypothetical Question.

9. The hypothetical question: "If the woman died from erysipelas what relation, in your opinion, as a physician and surgeon, did the scratch or abrasion have to her death?" to which the answer was: "It served as a point of entrance into the system of the germ of erysipelas"—was not objectionable as calling for the ultimate conclusion to be reached by the jury, to-wit, whether the injury which produced the

abrasion, was the direct and proximate cause of the woman's death.—*McAuley v. Casualty Company*, 185.

LINCOLN COUNTY.

Validity of act creating,—see Statutes and Statutory Construction, 13, 14.

LIVESTOCK.

See Claim and Delivery, 1-4; Sales, 8-10.

Larceny,—see Criminal Law, 22-26.

MAIL.

See Presumptions, 4.

MANDAMUS.

Settlement of bill of exceptions,—see New Trial, 20.

Supreme Court—Stenographer—Compensation—Liquidated Claim.

1. *Held*, on *mandamus* to the state auditor, that, where by general appropriation bill provision for the compensation of the stenographer of the supreme court had been made, his claim for salary earned was not an unliquidated claim which required approval of the board of examiners before issuance of warrant.—*State ex rel. Schneider v. Cunningham*, 165.

Deputy Game Wardens—Salary—State Auditor.

2. *Held*, on *mandamus*, that the state auditor properly refused to issue a warrant to relatrix, who had been appointed deputy game warden under House Joint Resolution 13 (Laws 1909, p. 390), such resolution not having the force of law.—*State ex rel. Peyton v. Cunningham*, 197.

Secretary of the State—Filing Certificate.

3. Secretary of State *held* to have wrongfully refused to file a certificate showing that a state bank had extended its corporate existence as authorized by statute.—*State ex rel. Cascade Bank v. Yoder*, 202.

MARRIED WOMEN.

See Parties, 1.

MASTER AND SERVANT.

See Personal Injuries, 1-5, 16-18, 24, 27-34.

MILEAGE.

See Counties, 1.

MINES AND MINING.

See, also, Personal Injuries, 1-4.

Placer mining, when ditches exempt from taxation,—see Taxation.

Quartz Lode Claims—Declaratory Statement—Sufficiency.

1. A declaratory statement of the location of a quartz lode mining claim which, though not technically complying with the requirements of the statute, did so substantially, was sufficient.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

Same—Notice of Location—Where Posted.

2. While the locator of a quartz lode mining claim is not required to sink his discovery shaft at the point of discovery, he must post his

notice of location at that point.—Butte Northern Copper Co. et al. v. Radmilovich, 157.

Same—Notice of Location—Posting.

3. The locator of a quartz lode claim had posted his notice of location a considerable distance away from the point of discovery, but about a month thereafter sank his discovery shaft at the point where he posted his notice of location. In the meantime, however, another had made discovery and posted his notice. *Held*, that because of the intervening rights of the latter, the former's location must be held to be postponed to the date when he posted his notice at the point of discovery.—Butte Northern Copper Co. et al. v. Radmilovich, 157.

Same—Location Notice—Description of Course of Vein.

4. The finding of the district court in an adverse suit to a mining claim that a notice of location describing the course of the vein as north and south was insufficient to support a location along a vein the general course of which was east and west, was erroneous.—Butte Northern Copper Co. et al. v. Radmilovich, 157.

Same—Contiguous Group—Representation Work—Forfeiture.

5. Where the annual work done and improvements made upon one of a group of contiguous quartz lode mining claims have no reference to a general plan for the development of the whole group, nor any reasonable adaptation to that end, the expenditures, no matter how large, cannot be said to have been made in the development of the consolidated claim, so as to prevent forfeiture of those claims in the group upon which no representation work had been performed.—Copper Mt. M. & S. Co. v. Butte etc. S. Co., 487.

Same—Forfeiture—Pleadings—Burden of Proof.

6. One claiming the forfeiture of a mining claim for alleged non-representation must plead it specially and has the burden of establishing his contention by clear and convincing proof.—Copper Mt. M. & S. Co. v. Butte etc. S. Co., 487.

Same—Contiguous Group—Representation Work—Burden of Proof.

7. The burden of proving that representation work done upon one of a contiguous group of quartz lode claims was done for the benefit of all, that it was adapted to the development of all, and was intended for that purpose, rests upon him against whom a forfeiture is sought for alleged nonperformance of assessment work upon the other claims in the group.—Copper Mt. M. & S. Co. v. Butte etc. Co., 487.

Same—Contiguous Group—Representation Work—Evidence.

8. Evidence *held* to justify a finding of the district court that plaintiff mining company had forfeited title to certain of a contiguous group of claims, where it appeared that work performed in driving a tunnel on one claim, alleged to have been done with a view to develop all of them, could not reasonably, in the nature of things, have been intended as a part of a general plan of development for the benefit of all.—Copper Mt. M. & S. Co. v. Butte etc. Co., 487.

Same—Contiguous Group—Representation Work—Good Faith.

9. The question whether improvements made upon one of a contiguous group of claims were intended for the development of all the claims constituting it, must be determined by the work as manifested by the relation it bears to the claims, irrespective of the good faith entertained by the owner when making the improvements.—Copper Mt. M. & S. Co. v. Butte etc. Co., 487.

MISCARRIAGE.

See Personal Injuries, 14, 15.

MISTAKE.

See Election of Remedies, 1.

MORTGAGES.

Deeds Absolute—Redemption—Tender.

1. Where a deed, absolute on its face, had been declared a mortgage, and the amount due was unliquidated and uncertain, the debtor in a subsequent suit to redeem was not required to plead a tender.—*Toole v. Weirick et al.*, 359.

Waste—Liability of Mortgagees.

2. A mortgagee of real property is chargeable for waste committed by him on the premises while in his possession, including the permanent depreciation in the property caused by his failure to make necessary or proper repairs, or resulting from the reckless or improvident management of it by himself or his tenant.—*Toole v. Weirick et al.*, 359.

Redemption—Interest Allowable.

3. After decree in a foreclosure suit the mortgage debt became merged in the judgment, and in a subsequent action, looking to the redemption of the property, interest was properly allowed at eight per cent per annum. (Revised Codes, sec. 5214.)—*Toole v. Weirick et al.*, 359.

Redemption—Accounting—Use and Occupation—Rents.

4. While a mortgagee who personally retains possession of the mortgaged premises, or who when not in actual possession, does not exercise reasonable care in selecting an agent to look after it, or whose agent fails in this respect, is chargeable on redemption with the reasonable value of the use and occupation thereof, to the amount of its fair rental value for the period, he is chargeable only with rents actually received where he depends on the interposition of an agent in the selection of whom reasonable care was exercised and who likewise exercised such care to keep the property rented at a fair rental.—*Toole v. Weirick et al.*, 359.

Promissory Notes—Taking Security—When Bar to Action—Pleading.

5. To constitute the taking of security a bar to an action on a note, under section 6861, Revised Codes, it must be alleged that the security was in the form of a mortgage, or what the law would deem the equivalent of a mortgage; the statute is a limitation upon the rights which usually pertain to property, and its restriction will not be construed to include personal or collateral security, or any form of security not falling within the meaning of "mortgage."—*State Savings Bank v. Albertson et al.*, 414.

MOTION IN ARREST.

What defects in information waived,—see Criminal Law, 29.

MOTION TO STRIKE.

To strike from answer,—see Pleading and Practice, 4; Statute of Limitations, 6.

MUNICIPAL CORPORATIONS.

Water Supply—Indebtedness—Extension of Constitutional Limit—Necessity for—How Determined.

1. Where the legislature had, by a general law applicable to all municipalities alike (Revised Codes, sec. 3259), extended the constitutional limit of indebtedness which a city could incur in the procurement of a water supply or the construction of a sewer system, it was

not necessary that the question whether the necessity calling for an extension of the limit of indebtedness existed, be first submitted to the law-making power and authority obtained from it through a special Act. The determination for such necessity rested with the taxpayers affected by the contemplated improvement.—*Carlson v. City of Helena*, 82.

Same—Purchase of Existing Water Supply not Obligatory.

2. Subsection 64, of section 3259, Revised Codes, does not make it incumbent upon a city, when it desires to acquire a water supply of its own, to purchase the system then maintained therein by any person or corporation under a franchise granted or contract made by the municipality; the course pointed out in the proviso in said section relative to the purchase of the then existing system being obligatory only when the city "desires" to so purchase; if not, it may procure any other available supply.—*Carlson v. City of Helena*, 82.

Indebtedness—Limitation of Amount—Interest.

3. In determining whether an indebtedness in excess of the limit authorized by law will be created by a proposed issue of municipal bonds, the interest reserved is not to be taken into account and added to the principal.—*Carlson v. City of Helena*, 82.

Same—Constitutional Provision—When Complied with.

4. The authority conferred upon a city council by a special election called for that purpose, to incur additional indebtedness for water and sewer purposes does not lapse upon the completion of the assessment-roll for the year in which the election is held. The requirement of section 6, Article XIII of the Constitution, that the question whether the debt shall be incurred must be submitted to the taxpayers "to be affected thereby," is satisfied if the council, after authority to act has been voted, proceeds with reasonable diligence to issue and sell the bonds.—*Carlson v. City of Helena*, 82.

Same—Extension—Submission to Electors.

5. To authorize a city to incur indebtedness beyond the limit prescribed by law, it is not necessary to hold two elections, one to extend the limit and incur the indebtedness and one to issue bonds.—*Carlson v. City of Helena*, 82.

Same—Purchase of Water Supply—City Council—Discretion.

6. The discretion to purchase a particular water supply for a city is by law vested in the council exclusively, and of this discretion it may not divest itself by submitting the question whether a certain supply shall be purchased, without having first ascertained whether it is available and can be acquired for the amount of indebtedness to be incurred.—*Carlson v. City of Helena*, 82.

Same—Provision for Payment.

7. The provision of section 6 of Article XIII, Constitution, that the revenues derived from a water system purchased or installed by a city shall be devoted to the payment of the debt incurred in its acquisition, does not impliedly prohibit the municipality from resorting to taxation to pay the principal and interest on the bonds evidencing the indebtedness.—*Carlson v. City of Helena*, 82.

Same—Bonds—Validity.

8. That municipal bonds upon their face pledge the full face and credit of the city to their payment is no objection to their validity.—*Carlson v. City of Helena*, 82.

Same—Bonds—Ordinances—Plurality of Subjects.

9. An ordinance calling for a special election for the authorization or rejection of an increase of the city's indebtedness by the issuance of water and sewer bonds, was not obnoxious to the prohibition contained

in section 3265, Revised Codes, that no ordinance shall be passed containing more than one subject. The general subject of the ordinance was the incurring of the indebtedness, and the different purposes named in it as making the indebtedness necessary were matters of detail for the information of the voters.—*Carlson v. City of Helena*, 82.

Powers—How to be Exercised.

10. Where a power is by law conferred upon a municipality and the mode of its exercise is pointed out, such mode must be pursued.—*Carlson v. City of Helena*, 82.

Same—Bonds—Time of Redemption.

11. In providing for the issuance of water and sewer bonds, it is incumbent upon the city council, under section 3460, Revised Codes, to make them redeemable, at its option, at a time prior to their maturity; its failure in this regard, renders them void.—*Carlson v. City of Helena*, 82.

Same—Bonds—Notice of Election—Contents.

12. Section 3455, Revised Codes, does not require that the notice of an election called for the purpose of obtaining authority to issue water and sewer bonds, shall state the time of payment of interest thereon. Section 3459 provides that it shall be paid semi-annually and the elector must be presumed to have understood that the time of payment would be that fixed by the statute.—*Carlson v. City of Helena*, 82.

Same—Bonds—Payable in Gold Coin—Validity.

13. In the absence of legislation declaring otherwise, a city council may issue bonds "payable in gold coin of the United States of America, of the present standard of weight and fineness."—*Carlson v. City of Helena*, 82.

Same—Bonds—Ordinances—Initiative and Referendum Statute—Inapplicability.

14. The provision of section 3268, Revised Codes, that no ordinance passed by the council of a city shall become effective until thirty days after its passage, which section is a part of the initiative and referendum law applicable to cities (Revised Codes, secs. 3266-3276), has no application to an ordinance providing for the issuance of water and sewer bonds after sanction of the taxpayers affected thereby has been obtained. The law has to do with matters of general legislation on which all electors, whether taxpayers or not, may vote, while the question whether bonds shall be issued can be submitted to taxpayers only.—*Carlson v. City of Helena*, 82.

Streets—Ejectment—Complaint—Sufficiency.

15. A complaint in ejectment by a city to recover possession of a strip of ground alleged to be a public street, which stated that the city was the owner of an easement in the property described, for street and highway purposes, that it was entitled to the immediate possession of the ground, and that defendant had taken possession of and was wrongfully withholding it, was sufficient.—*City of Butte v. Mikosowitz*, 350.

Highways—How Established—Prescription.

16. Section 2477, U. S. Rev. Stats., grants a right of way for the construction of highways over public lands, but does not specify the method by which the roadway is to be established. *Held*, that any acts by which the public might acquire a public roadway over private property, other than by purchase, were sufficient to constitute an acceptance of the grant, and that therefore evidence that a city had used a strip of ground for twelve or thirteen years as a public roadway under such a grant was ample to establish a road by prescription.—*City of Butte v. Mikosowitz*, 350.

Same—Grants—Relation Back.

17. An acceptance of a grant of public land for highway purposes, under section 2477, U. S. Rev. Stats., relates back to the date of the grant or dedication, and one taking such land after acceptance by a municipality, does so subject to the rights which the public has acquired.—*City of Butte v. Mikosowitz*, 350.

Same—Streets—Building Permits—Estoppel.

18. Where a city has acquired an easement in public land for street purposes prior to the taking of such land by defendant, it could not be estopped to assert its right by the acts of its building inspector in issuing building permits to defendant, relying on which he claimed to have made valuable improvements on the land, and evidence to that effect was properly excluded.—*City of Butte v. Mikosowitz*, 350.

Streets—Width.

19. The court in awarding plaintiff city a strip of ground sixty feet in width, instead of confining the width to the beaten path, did not err, since the word "highways," as used by Congress in section 2477, must be construed in accordance with recognized local laws, customs and usages, and since section 1339, Revised Codes, provides that they must be sixty feet wide, unless otherwise ordered by the officers having control or supervision over them.—*City of Butte v. Mikosowitz*, 350.

Same—Public Lands—Grants for Highways—Evidence of Use.

20. The grant of public land for highway purposes, made by Congress in section 2477, U. S. Rev. Stats., is to the public as a continuing body; therefore, as soon as territory over which a highway had been established under the grant became part of an incorporated city, the latter took the place of the county as the trustee of the public in supervising and controlling it, and the court did not err in admitting evidence of the use made of the strip of ground mentioned in the above paragraphs, prior to the time the land was first included within the city limits.—*City of Butte v. Mikosowitz*, 350.

Same—General Verdict—Effect.

21. Defendant not having submitted any special interrogatories upon the question whether the city's right of action was barred by the statute of limitations, he was bound by the general verdict in plaintiff's favor upon all the issues.—*City of Butte v. Mikosowitz*, 350.

Discharge of Sewage—State Board of Health—Regularity of Procedure.

22. The fact that the state board of health did not hear testimony before it made an order prohibiting a city from polluting a stream which is a source of water supply for domestic uses, is not a valid objection to the order. Section 1566, Revised Codes, under which the board acted, does not provide for a public trial, but contemplates an *ex parte* investigation by the board.—*City of Miles City v. State Board of Health*, 405.

Same—Pollution of Streams—Statutes.

23. The validity of the order of the state board of health above referred to was not affected by the fact that the intake of the water supply of the next town on the river below the outfall of defendant city's sewer was many miles away. The prohibition of the statute (Chapter 177, Laws 1907 [Revised Codes, secs. 1559-1572]), is against the pollution of a stream at any place within the state.—*City of Miles City v. State Board of Health*, 405.

Same—Public Health—Prescription—Police Power.

24. Prescription does not run against the right of the state to protect the public health by preventing the pollution of a stream which is a water supply for domestic uses; nor may the state waive or divest itself of its police power in this respect.—*City of Miles City v. State Board of Health*, 405.

Same—Appeal from Order of Board—Burden of Proof.

25. A city against which the state board of health had issued an order prohibiting it from emptying its sewage into a river before proper purification, had the burden of showing, on appeal to the district court, that the order was not justified; hence, where it produced no evidence whatever, and the order, upon its face, bore no evidence of its own invalidity, the order will be held valid.—*City of Miles City v. State Board of Health*, 405.

MURDER.

See Criminal Law, 13-21.

NEGOTIABLE INSTRUMENTS.**Agency—Intention of Parties—Ambiguity—Parol Testimony—Admissibility.**

1. In an action to recover on a promissory note, signed by defendant and others with the word "Trustees" added to their signatures, defendant denied that he ever received any consideration for the note, and alleged that it had been executed by him as trustee of a mining company and not in his individual capacity, that the consideration expressed in it was received and enjoyed solely by the company, and that it was so understood between defendant and the payee of the note at the time of its execution and delivery. At the trial the court, over objection of plaintiff, permitted defendant to introduce parol testimony in support of the affirmative allegations of the answer. *Held*, that the court's action was correct, the rule being, in such cases as this, that where a note is so ambiguous on its face as to leave it in doubt who is bound by it, parol testimony is admissible to solve the question.—*Knippenberg v. Greenwood M. & M. Co. et al.*, 11.

Taking Security—When Bar to Action—Pleading.

2. To constitute the taking of security a bar to an action on a note, under section 6861, Revised Codes, it must be alleged that the security was in the form of a mortgage, or what the law would deem the equivalent of a mortgage; the statute is a limitation upon the rights which usually pertain to property, and its restriction will not be construed to include personal or collateral security, or any form of security not falling within the meaning of "mortgage."—*State Savings Bank v. Albertson et al.*, 414.

Same—Pleading and Proof.

3. Plaintiff brought suit to recover on a promissory note. Defendants answered by alleging, *inter alia*, that plaintiff had taken "security" for the payment of the note. Section 6861, Revised Codes, provides that where a debt is secured by a mortgage upon real or personal property, recourse must be had to foreclosure proceedings. Defendants offered evidence to show that real estate had been conveyed to plaintiff to secure payment of the note. The court refused the offer. *Held*, that the court did not err, in that the allegation in defendants' answer that plaintiff had taken "security," was insufficient, under the rule declared in paragraph 2 above, to present an issue coming within the purview of the section, and the evidence was therefore irrelevant and immaterial.—*State Savings Bank v. Albertson et al.*, 414.

Illegality of Contract—Pleading and Proof.

4. Where defendants in an action on a promissory note had not alleged in their pleading that the purpose for which the note was given was illegal, they were properly denied permission to prove its illegal purpose.—*State Savings Bank v. Albertson et al.*, 414.

NEW TRIAL.

On Condition—Excessive Damages—Power of Courts.

1. Courts have power to impose as a condition precedent to the denial of defendant's motion for a new trial, that plaintiff shall remit such portion of the damages awarded by the jury as is deemed excessive.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 22.

Same—Final Order.

2. Upon the filing of a written acceptance of the condition imposed by the court that plaintiff remit so much of the verdict of the jury as it deemed excessive or submit to a new trial, the order becomes a final order denying a new trial.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 22.

Conditional Order—Compliance—Waiver of Irregularities.

3. Plaintiff in a personal injury action had judgment for \$7,500. The court denied a motion for a new trial, provided plaintiff remit all damages in excess of \$4,000. This plaintiff did, but in his written acceptance of the condition imposed, stated that he did so "if the court had jurisdiction to make the order," he claiming that the court was without jurisdiction to make the order in that notice of intention to move for a new trial had not been given. He then appealed. *Held*, that, by filing his acceptance of the condition precedent to the denial of a new trial, plaintiff waived any irregularity in the proceedings on the new trial motion and could not appeal from the order.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 22.

Appeal—Dismissal—Record.

4. An appeal from an order denying a new trial will be dismissed where a copy of the order denying the motion is not incorporated in the transcript.—*Hale v. County of Jefferson et al.*, 137.

New Trial Order—On Minutes.

5. Where a notice of intention to move for a new trial recited that the motion would be made on the minutes of the court and a bill of exceptions, and the order of the court simply stated that it was granted, it was not sufficient for appellant to show that the court was not warranted in granting the motion on the bill of exceptions (which was absent from the record), but he had the burden of showing also that it was not authorized to do so upon the minutes.—*Sanden v. Northern Pac. Ry. Co.*, 209.

Excessive Damages—Remission.

6. Where the damages awarded are clearly excessive, both the supreme as well as the district court has the power to require the plaintiff either to remit a portion of the verdict or submit to a new trial.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Insufficient Evidence—Duty of Court.

7. It is the duty of the district court to grant a new trial, if in its opinion the evidence, in weight, did not justify the verdict rendered.—*Hamilton v. The Monidah Trust et al.*, 269.

Evidence—Conclusions—Discretion.

8. Where, in a boundary dispute, the evidence submitted by plaintiff, upon whom rested the burden of proof, was based chiefly upon conclusions relative to the location of his original stakes, without facts to warrant them, the court did not abuse its discretion in awarding a new trial to defendants.—*Hamilton v. The Monidah Trust et al.*, 269.

Appeal and Error—Record—Waiver.

9. Alleged errors in rulings of the court on the admission and exclusion of evidence and the allowance of amendments to the pleadings during trial, which were not called to its attention on the submission of the motion for new trial, based upon the minutes only, and in the

absence of a bill of exceptions making them a part of the judgment-roll, will be conclusively presumed to have been waived.—*Foster et al. v. Winstanley et al.*, 314.

Same—Form of Assignments—Presumptions.

10. Though the ground on which a new trial had been asked was stated by the judge in his certificate authenticating the record on appeal in an equity case, to have been that the evidence failed to support the judgment, and such ground is not one of those enumerated in section 6794, Revised Codes, yet where appellants in their brief made the statutory assignment that the evidence was insufficient to justify the court's decision, and counsel for respondent argued the assignment on its merits, the supreme court will assume that the trial judge intended to state that the matter was properly submitted to him.—*Foster et al. v. Winstanley et al.*, 314.

Order—Opinion of District Court—Not Part of Record.

11. Where a motion for a new trial, made on several of the statutory grounds, is sustained by an order general in its terms, the supreme court in its review is not restricted to a consideration of the reason for his action given by the judge in a memorandum opinion attached to the order; such opinion is not a part of the record on appeal; but if the order can be justified upon any of the grounds of the motion, it will be affirmed.—*Winnicott v. Orman et al.*, 339.

Appeal—Conflicting Evidence—Review.

12. Where the evidence presents a substantial conflict, the finding of the jury thereon and the court's action in denying a motion for new trial are conclusive upon the supreme court.—*State Savings Bank v. Albertson et al.*, 414.

Appeal—Record—Sufficiency.

13. Where the record on appeal from a new trial order, made upon the minutes of the court, contains all the papers enumerated in sections 6799 and 7114, Revised Codes, and the certificate of the trial judge recites that the statement of the case is true and correct, it will be held to contain all the minutes.—*Sutton v. Lowry et al.*, 462.

Misconduct of Jurors—Affidavits—Information and Belief—Hearsay.

14. Affidavits based upon matters of hearsay or upon information and belief are incompetent to show misconduct of jurors.—*Sutton v. Lowry et al.*, 462.

Same—Affidavits—Insufficiency.

15. Affidavits reciting that a juror had certain amounts of money immediately after the trial of a cause, a retrial of which was sought on the ground of misconduct of jurors, were insufficient, where affiants disclaimed any knowledge of the source from which such money was received.—*Sutton v. Lowry et al.*, 462.

Same—Affidavits—Immateriality.

16. A record of a contempt proceeding against a juror relating to matters which occurred subsequent to, and were not in any manner connected with, the cause of which a new trial was asked because of misconduct of such juror, was immaterial, and therefore properly excluded.—*Sutton v. Lowry et al.*, 462.

Same—Impeaching Verdict—Affidavits of Jurors—Inadmissibility.

17. The provision of section 6794, subdivision 2, Revised Codes, that the affidavits of jurors may be used to impeach a verdict only when it was reached by resort to chance, is exclusive; hence, an affidavit of a juror, relating to a conversation had with another juror touching the latter's misconduct, was incompetent; as was also that of one, not a juror, as to the contents of an affidavit of the offending juror, for the same and the additional reason that it was hearsay.—*Sutton v. Lowry et al.*, 462.

Same—Incompetency of Juror—Time to Object.

18. Plaintiff's affidavit in support of a motion for a new trial alleged that one of the jurors sitting in the cause had pursued his vocation as pumpman in a mine every night during the trial, and was therefore not able to give to it that full and deliberate consideration which a litigant is entitled to from a juror. The affidavit did not set forth that neither plaintiff nor his counsel knew of this during the progress of the trial. *Held*, that in the absence of such an averment the affidavit was unavailing, since a party cannot speculate upon the chances of a verdict by refraining from objecting to the incompetency of a juror, known of during the trial, and then, upon an unfavorable outcome, urge the objection on motion for a new trial.—*Sutton v. Lowry et al.*, 462.

Insufficiency of Evidence—Abuse of Discretion.

19. Where a review of the evidence in an action for the breach of an oral contract disclosed that the verdict of the jury in favor of defendants was the only one which could justly have been reached, the trial court abused its discretion in granting a new trial on the ground that the evidence was insufficient to justify the finding.—*Sutton v. Lowry et al.*, 462.

Bills of Exceptions—Amendments—Delivery to Judge—Notice—Settlement—Practice.

20. Defendant prepared a bill of exceptions to be used on his motion for a new trial, and on July 8 served same on counsel for plaintiff, who, on July 17, served certain proposed amendments. These not having been accepted, counsel for movant, on July 24, delivered the proposed bill and amendments to the judge. At the time noticed for the settlement of the bill, July 30, opposing counsel objected to its settlement on the ground that the papers had not, within ten days after service of the amendments, been presented to the judge for settlement, upon five days' notice to objecting counsel. The district judge refused to settle the bill. *Held*, on *mandamus*, that this was error, inasmuch as under section 6788, Revised Codes, a party may within ten days after service of the amendment, (1) present the bill with the amendments to the judge upon five days' notice to the adverse party, or (2) deliver them to the clerk, or (3) deliver them to the judge, and that defendant, having chosen to deliver them to the judge directly, was relieved from giving the five days' notice; *held*, further, that upon delivery of the papers to him it became the duty of the judge to settle and sign the bill immediately or at some future date fixed for that purpose.—*Girard v. McClernan*, District Judge, 523.

NONAPPEALABLE ORDERS.

See Orders, 2.

NONSUIT.**Denial—When Proper.**

1. Nonsuit was properly denied in a personal injury action where plaintiff failed to introduce evidence in support of an allegation that defendant's conduct was willful, such allegation not having been of the gravamen of the complaint.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Denial—When Error Cured.

2. Where defendant, after an adverse ruling on a motion for nonsuit made at the close of plaintiff's case, introduced evidence which cured the defects upon which the motion was based, the error in denying the

motion will be deemed to have been waived.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Personal Injuries—Evidence—Insufficiency.

3. In a personal injury action the burden is upon plaintiff to prove the negligence of defendant as alleged, and that such negligence was the proximate cause of his injury; hence if the conclusion to be reached from his testimony is equally consonant with the truth of his allegations and some other theory or theories inconsistent therewith, it becomes a mere conjecture and insufficient to establish his case, and nonsuit should be granted.—*Winnicott v. Orman et al.*, 339.

Reformation of Deeds—Error.

4. Where the evidence adduced by plaintiff in an action to reform a deed was clear, satisfactory and convincing that the instrument as written did not contain the agreement actually entered into by the parties, that there was a mutual mistake as to a material fact, and that such mistake did not result from plaintiff's negligence, the court erred in granting a nonsuit.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

NOTICE.

See, also, Injunction, 3; New Trial, 20.

Constructive,—see Deeds, 1, 2.

NUISANCES.

See Injunction, 1-6.

OBJECTIONS.

See Instructions, 9.

Insufficiency of Complaint—When Objection may be Made.

1. The objection that a complaint does not state a cause of action may be raised for the first time on a motion for a directed verdict, or at any time.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

To Introduction of Evidence—Review.

2. An objection to the introduction of testimony not made in the district court, cannot be raised for the first time on appeal.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124; *Butte Northern Copper Co. et al. v. Radmilovich*, 157.

OFFER OF PROOF.

Exclusion,—When harmless error,—see Injunction, 2.

Exclusion—When Proper.

1. Error cannot be predicated on the exclusion of an offer of proof covering a subject fully developed by other testimony.—*State v. Pemberton*, 530.

OFFICE AND OFFICERS.

Offices—How Created.

1. An office can be created only by law duly enacted for that purpose.—*State ex rel. Peyton v. Cunningham*, 197.

Joint Resolution—Creation of Office—Invalidity.

2. *Held*, that House Joint Resolution No. 13 (Laws 1909, p. 390), conferring authority upon the state game warden to appoint the widow of a deputy warden, who was killed in the discharge of his duties, a deputy in addition to those authorized by Chapter 87, Laws of 1909 (p. 118), is invalid.—*State ex rel. Peyton v. Cunningham*, 197.

OPINION EVIDENCE.

See Evidence, 15, 21, 25.

ORDERS.

New Trial on Condition—Final Order.

1. Upon the filing of a written acceptance of the condition imposed by the court that plaintiff remit so much of the verdict of the jury as it deemed excessive or submit to a new trial, the order becomes a final order denying a new trial.—Harrington v. Butte, A. & Pac. Ry. Co., 22.

Nonappealable—Actions—Dismissal.

2. An order dismissing an action for failure of defendant company to demand and have entered a judgment in its favor within six months after rendition of verdict, is not a final judgment nor an order from which an appeal may be taken.—Hovey v. Northern Pac. Ry. Co., 40.

ORDINANCES.

Initiative and referendum statute—Inapplicability,—see Municipal Corporations, 14.

Plurality of subjects,—see Municipal Corporations, 9.

PARENT AND CHILD.

Due care of child,—see Personal Injuries, 13.

PARTIES.

See, also, Trusts and Trustees, 7.

Injunction—Drains—Married Women.

1. A married woman having only an inchoate right of dower in her husband's lands over which a right of way for a public drain is sought to be secured under the drain statute, need not be made a party to the proceedings.—Summers et al. v. Sullivan, 42.

Associations—Actions Against, in President's Name.

2. A voluntary association of laborers cannot, in the absence of statute authorizing it, be sued in the name of its president.—Vance v. McGinley, 46.

Claim and Delivery.

3. The purpose of an action in claim and delivery being to recover possession of specific property, or the value of it in case possession of it cannot be had, the person who at the commencement of suit has possession of and wrongfully detains it, is the proper person to be sued.—Sullivan v. Girson et al., 274.

PARTNERSHIP.

Dissolution—At Will.

1. One member of a general partnership, the duration of which is not fixed by agreement, may dissolve the same at any time.—Freund v. Murray, 539.

Action Between Partners—Dissolution—Tort—Complaint—Insufficiency.

2. Held, that a complaint which alleged that plaintiff and defendant had been partners as physicians; that as such they used a hospital owned by the latter; that plaintiff, at the solicitation of defendant, had purchased his interest from a former partner of defendant for \$5,000; that about twelve years after the formation of the partnership, defendant, believing that the business, a large portion of which consisted of contracts with employers for the treatment of their em-

ployees, was about to greatly increase, and wickedly desiring to exclude plaintiff from such increase, secretly notified the patrons of the firm that plaintiff's connection with the business would soon cease, and solicited their patronage for himself; that defendant had failed to account for certain proceeds of firm business; that while plaintiff was absent, defendant removed his fixtures, instruments, etc., from the hospital and thereafter excluded him from participation in the management of the partnership affairs,—did not state a cause of action at law, as for a tort, to recover either actual or compensatory damages.—*Freund v. Murray*, 539.

PASSENGERS.

See Personal Injuries, 19, 20, 22, 23, 28.

PERSONAL INJURIES.

Master and Servant—Safe Appliances—Statutory Provisions—Noncompliance—Liability of Master.

1. Where the legislature has declared that the master shall adopt certain precautions to guard against danger to his employees, the common-law rule of reasonable care is no longer the measure of his duty, and any failure on his part to observe the required precautions is such a breach of duty as will render him liable to the servant for any injury caused to the latter by his disobedience.—*Monson v. La France Copper Co.*, 50.

Same—Safe Appliances—Legislative Wisdom—Courts may not Question.

2. In the absence of constitutional limitation upon the power of the legislature to declare what precautions the master shall observe, or what appliances he shall adopt, to safeguard the lives and limbs of his employees, its judgment in this regard is binding, and it is beyond the power of the courts to inquire into the wisdom of the legislation.—*Monson v. La France Copper Co.*, 50.

Same—Nonperformance of Statutory Duty—Burden of Proof—Proximate Cause.

3. In an action to recover damages for the death of an employee, alleged to have been caused through the fault of the employer by reason of his nonperformance of a statutory duty relative to safeguarding appliances, the burden is upon plaintiff to show the causal connection between the negligence as alleged and the injury, *i. e.*, that defendant's negligence in failing to observe the statutory requirement was the proximate cause of the injury.—*Monson v. La France Copper Co.*, 50.

Same—Nonperformance of Statutory Duty—Proximate Cause—Evidence—Insufficiency.

4. Evidence in an action against a mining company to recover damages for the death of one of its employees, claimed to have been caused through his falling out of a cage while being hoisted out of the mine, because of defendant's negligence in failing to see that the doors with which the cage was provided were in place, as required by section 8536, Revised Codes, *held*, not to show that the alleged negligence was the efficient cause of the death of plaintiff's intestate.—*Monson v. La France Copper Co.*, 50.

Street Railways—Willful Conduct of Defendant—Nonsuit.

5. Where the burden of the complaint against a street railway company was that the death of plaintiff's testator, for which damages were sought, was due to the negligence of defendant's employees in managing one of its cars, failure on plaintiff's part to introduce evidence in support of an additional allegation that defendants' conduct was willful did not warrant the granting of a nonsuit.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Evidence—Last Clear Chance.

6. Evidence *held* to have been sufficient to furnish basis for the application of the doctrine of last clear chance.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Instructions—Proper Refusal.

7. An action against a street railway company having been tried upon the theory that negligence in the management of its car could properly be predicated upon the failure of its motorman to exercise reasonable care after deceased was discovered in a situation of peril, a requested instruction which would have authorized the jury to find for defendant, regardless of the conduct of the motorman after he discovered deceased in a place of danger, was properly refused.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Willful Conduct of Defendant—Instructions—Proper Refused.

8. A requested instruction that plaintiff could not recover, even though defendant company was negligent in running its car and deceased was in no respect negligent, unless its conduct in managing the car was willful and reckless, was properly refused where the allegation of willfulness and recklessness in the complaint was not of the gravamen of the pleading, where no evidence had been introduced in support of it, and where there was evidence sufficient to warrant recovery aside from the question of willfulness and recklessness.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Earning Capacity—Opinion Evidence.

9. A witness who testified that he had known deceased for twenty years and had himself for thirty-five years conducted a similar business to that carried on by the latter, that he had done a great deal of business with deceased, and that the latter's capacity as a business man was first class, that he was a good mechanic, kept his own books, etc., and that, in his judgment his earning capacity prior to his death was \$5,000 a year, was qualified to express an opinion as to the value of deceased's services to his business.—*Yergy v. Helena L. & Ry. Co.*, 213.

Same—Excessive Damages—Jury—Passion and Prejudice.

10. In awarding damages claimed to be excessive, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors, if the verdict is based on competent testimony, in accordance with instructions of the court, and easily to be arrived at by mathematical calculation.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Same—Excessive Damages—Remission of Excess—New Trial.

11. *Held*, that a verdict for \$40,000 was excessive, and a new trial ordered unless plaintiff consent to a reduction of the judgment to \$15,000.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Conflicting Evidence—Findings of Jury—Conclusiveness.

12. Where, in an action against a railway company to recover for personal injuries to plaintiff's minor child, the evidence whether the infant ran in front of the moving cars so as to render the injury unavoidable, or whether the defendant's employees were negligent, was conflicting, the jury's finding thereon will not be disturbed on appeal.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 299.

Railway Crossings—Parent and Child.

13. Evidence that the parents of a minor child injured at a railway crossing, exercised due care of the child, *held* sufficient to go to the jury.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 299.

Complaint—Uncertainty—Nature of Injuries—Demurrer.

14. A special demurrer to the complaint in a personal injury action, which alleged that by reason of defendant city water company's negligence in shutting off the water from a tank connected with plaintiff's

stove without her knowledge, an explosion occurred, and plaintiff was so injured and mentally disturbed thereby that being with child, she lost the same, and became very sick, and on account thereof suffered great pain and injury, etc., was properly sustained. It was impossible to tell from the pleading whether the grievances complained of were the result of physical injury and mental disturbance, or of mental disturbance alone.—*Hosty v. Moulton Water Co. et al.*, 310.

Women—Miscarriage—"Injured Feelings"—Not Element of Damage.

15. While a woman who suffers a miscarriage as a result of physical injury may recover for any mental or physical suffering attendant upon the miscarriage, injured feelings following the miscarriage, not a part of the pain naturally attending it, are too remote to be considered an element of damages.—*Hosty v. Moulton Water Co. et al.*, 310.

Evidence—Insufficiency—Nonsuit.

16. In a personal injury action the burden is upon plaintiff to prove the negligence of defendant as alleged, and that such negligence was the proximate cause of his injury; hence if the conclusion to be reached from his testimony is equally consonant with the truth of his allegations and some other theory or theories inconsistent therewith, it becomes a mere conjecture and insufficient to establish his case, and nonsuit should be granted.—*Winnicott v. Orman et al.*, 339.

Same.

17. The district court not only did not err in granting a new trial, but should have nonsuited plaintiff, in an action for damages to compensate him for personal injuries alleged to have been sustained by him, while employed by defendants as a laborer in railroad construction work by reason of their failure to ascertain whether there was a "missed hole" after one of their blasting operations,—where the evidence introduced by him left it to conjecture whether the explosion was caused by his picking into a "missed hole" or into a piece of dynamite left loose in the dirt, or into a cap, used to explode the charge, accidentally dropped by a workman the day before the accident.—*Winnicott v. Orman et al.*, 339.

Contractors—Subcontractors—Liability—Evidence—Insufficiency.

18. In an action against a contractor and a subcontractor for injuries to a member of a railroad construction crew, evidence held insufficient to show that plaintiff was employed by the former.—*Winnicott v. Orman et al.*, 339.

Railroads—Postal Clerks—"Passengers."

19. Postal clerks, when carried by a railway company under an arrangement with the United States government with reference to the transportation and handling of mail, are "passengers."—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Postal Clerks—Passengers—Burden of Proof.

20. Where, in an action against a railroad company by a railway postal clerk for injuries sustained while off duty, caused by the derailment of a train, plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was on him to prove that he was a passenger, and it was incumbent on him to show, either that defendant was under a specific contractual or statutory obligation to the government to carry him in the mail-car where he was at the time, or that defendant recognized a request for transportation when he was off duty.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Excessive Speed—Proximate Cause.

21. The running of a railway train, when late, at a speed of forty-five miles per hour, is not *per se* excessive, and the fact that the schedule time was about twenty-four miles per hour is of no importance in deter-

mining whether the carrier's alleged negligence in this regard was a proximate cause of a derailment.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Passengers—Cause of Derailment—Complaint—Surplusage.

22. Plaintiff, in an action against a railway company for injuries suffered while being transported as a passenger, need not allege or prove in his affirmative case the particular cause of a derailment; therefore, allegations of specific causes of the accident should be treated as surplusage, and he may rely upon his *prima facie* case without attempting to substantiate them.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Cause of Derailment—Pleading and Proof.

23. In a personal injury action against a railway company where proof of the specific cause of derailment of a train is necessary to fix a liability upon defendant, the failure of plaintiff to make *prima facie* proof of one, at least, of the grounds of negligence alleged in the complaint is fatal, and proof of some other ground will not supply the defect.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Brakemen—Scope of Authority—Ejecting Trespassers.

24. The presumption obtains that a brakeman on a freight train has *prima facie*, authority, by virtue of his employment, to eject trespassers therefrom; therefore, where defendant railway company, in an action seeking damages for injuries sustained by plaintiff in being ejected from one of its freight trains, did not offer any rebutting evidence on the question of the duties of a brakeman, it could not complain of the admission of parol and documentary evidence, in the shape of printed rules and bulletins by the company, touching such duties.—*Golden v. Northern Pacific Ry. Co.*, 435.

Same—Ejecting Trespassers—Evidence—Sufficiency.

25. Evidence, in an action against a railway company for injuries caused to plaintiff in being ejected from a freight train by one of defendant's brakemen, held sufficient to go to the jury on the question of the identity of the person who ejected plaintiff.—*Golden v. Northern Pacific Ry. Co.*, 435.

Same—Ejecting Trespassers—Instructions—Submitting Questions of Law—Harmless Error.

26. Plaintiff having testified that, while riding on top of a freight-car, defendant's brakeman forced him, under threats of violence, to jump from the moving train, and the court in other portions of its charge having assumed, with defendant's acquiescence, that the brakeman's conduct was unlawful, an instruction that if plaintiff was on top of the car he was a trespasser, and that defendant could prevent such trespass "by lawful means," could not have been prejudicial to defendant as leaving the question of law, what constituted the lawful means defendant's employees could resort to in ejecting trespassers, to be answered by the jury.—*Golden v. Northern Pacific Ry. Co.*, 435.

Insufficiency of Complaint—When Objection may be Raised.

27. The objection that the complaint in a personal injury action did not state a cause of action may be raised for the first time on a motion for a directed verdict, or at any time.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

Railroads—Passengers—Contributory Negligence—Complaint—Insufficiency.

28. Plaintiff's complaint in an action against a railroad company alleged that defendant's train on which he was a passenger, while slackening its speed when approaching his destination, did not stop; that it was dark and he could not tell that the train was running at a great rate of speed; that he was directed by defendant's brakeman to jump, and did so, receiving the injuries complained of. Held, under *Kennon v. Gilmer*, 4 Mont. 433, that since the proximate

cause of his injury was plaintiff's own act, to-wit, jumping off while the train was in motion, it was incumbent upon him to further allege facts sufficient to show that, in so doing, he was not guilty of contributory negligence, *i. e.*, that he acted as a reasonably prudent person would have acted under like circumstances; having failed to so plead, his complaint did not state a cause of action.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

Special Damages—Pleading.

29. Special damages, *i. e.*, damages which are the natural, but not the necessary, result of an injury, must be specifically pleaded.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Same—Railroads—Pleading—Evidence—Admissibility.

30. Plaintiff alleged in his complaint that while employed about a railway locomotive the water-gauge thereon exploded, with the result that the sight of his right eye was destroyed. There was no allegation that the left eye had been injured. Over objection, he was permitted to show that, as a result of the accident, the sight of his left eye had been greatly impaired; he did not introduce any testimony that such impairment was the *necessary* result of the destruction of the right eye. *Held*, that in the absence of such proof, or an allegation specially pleading injury to the left eye, evidence relative thereto was inadmissible.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Judicial Notice—Laws of Nature.

31. While courts may take judicial notice of the fact that destruction of the sight of one eye impairs the power of vision, they may not assume, without proof, that such destruction necessarily affects the sight of the other eye injuriously.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Complaint—Evidence—Inadmissibility.

32. Assuming that an allegation in plaintiff's complaint that he suffered excruciating pain on account of the injury to his right eye, was sufficient to admit evidence of pain in the other, it was not broad enough to enable him to show that the sight of the left eye had been greatly impaired.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Loss of Earnings—Proof—Inadmissibility.

33. It was error to permit plaintiff, under his case as made (paragraph 30 above), to submit evidence of loss of time on account of impairment of the sight of his left eye.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Same—Pleading and Proof.

34. *Quære*: May plaintiff in a personal injury action prove loss of earnings without specifically alleging the fact of such loss?—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

PHYSICIANS AND SURGEONS.

See, also, Partnership, 2.

Revocation of License—Special Proceeding—Appeal.

1. The application of a physician to the district court to have the action of the state board of medical examiners, in revoking his license for alleged unprofessional and dishonorable conduct, judicially determined, is a special proceeding, from the judgment in which an appeal lies to the supreme court.—*State ex rel. Gattan v. District Court*, 134.

Same—Failure to Appeal—*Certiorari*.

2. Where a physician fails to avail himself, within one year after entry of judgment, of the remedy by appeal, from the action of the district court in affirming the revocation of his license by the state board

of medical examiners, he may not thereafter have it reviewed on *certiorari*.—State ex rel. Gattan v. District Court, 134.

PLEADING AND PRACTICE.

Settlement of bill of exceptions,—see New Trial, 20.

See, also, Criminal Law.

General Denial—When Proper.

1. A general denial is proper in cases where the pleader has theretofore generally or specifically denied certain allegations of the complaint, as also where he has denied any knowledge or information sufficient to form a belief as to the truth of particular allegations, and has specifically admitted others.—Pengelly v. Peeler, 26.

Denial on Information and Belief—Sufficiency.

2. Where defendant denied, as to certain specified allegations of the complaint, that he had "any knowledge or information [thereof] sufficient to form a belief," the omission of the word "thereof," used in section 6540, Revised Codes, authorizing denials on information and belief, was immaterial.—Pengelly v. Peeler, 26.

Injunction—Complaint—Insufficiency.

3. Where the complaint of a number of land owners asking an injunction against a drain commissioner to restrain him from proceeding with the establishment of a public drain over their lands failed to state that a certain one of them was not a party to proceedings had under the drain statute (Revised Codes, secs. 2412 *et seq.*), that she was not served with citation, that she did not appear and contest the right of the commissioner to proceed, and that the special commissioners did not hear her and assess and award to her adequate damages, it was insufficient as to her.—Summers et al. v. Sullivan, 42.

Pleadings—Answer—Motion to Strike.

4. The court, in an action to quiet title to a ditch, did not err in striking from defendant's answer an allegation that defendant had received nothing on account of the construction of the ditch over his land, and that, if maintained, he would be damaged in a certain sum. Plaintiff's ditch having been completed before any rights of defendant to the land traversed by it had accrued, he suffered no injury because of plaintiff's continued use of the ditch, and no rights of defendant were violated.—Cottonwood Ditch Co. v. Thom, 115.

Judgment—Restraining Enforcement—Tender.

5. In an action to enjoin the enforcement of a judgment against him amounting to over \$7,000, plaintiff alleged, *inter alia*, that defendants were indebted to him in a sum in excess of \$5,000 and insolvent, and that he was willing and ready to pay the balance of the judgment in favor of defendants. The court issued an order granting an injunction *pendente lite*. *Held*, that for failing to make a tender of the amount admittedly due to defendants, the complaint did not state facts sufficient to entitle plaintiff to the relief granted.—Kaufman v. Cooper et al., 146.

Pleadings—Amendment at Trial.

6. Plaintiff, in an action on an insurance policy, was properly allowed to amend his complaint at the trial by the allegation that "he, had duly performed each and all of the obligations in said contract on him binding."—McAuley v. Casualty Company, 185.

Same—Amendments at Trial—Relation Back.

7. An insurance policy provided that unless action upon it was commenced within six months after it accrued, it should be barred. Assured died October 24, 1906, and the beneficiary commenced suit on April 24, 1907. At the trial, on October 23, 1907, he was permitted to amend his complaint by inserting that he had duly performed all

obligations made binding upon him in the contract. *Held*, under *Clark v. Oregon Short Line R. R. Co.*, 38 Mont. 177, that the original pleading was sufficiently substantial to permit of its being amended so as to fully state the same cause of action attempted to be stated in the first instance; that the amendment related back to the date at which the complaint was filed, and that therefore the contention that the action was barred because the complaint never stated a cause of action until after amendment, had no merit.—*McAuley v. Casualty Company*, 185.

Trusts—Enforcement—Complaint—Sufficiency.

8. A complaint which alleged that plaintiff and defendant were co-owners in a mining claim; that defendant sold the property and received therefor as part compensation 5,000 shares of the capital stock of a certain company; that a certificate calling for the entire 5,000 shares had been issued to defendant who had refused to transfer to plaintiff the number of shares belonging to him, stated a cause of action for the enforcement of a trust in the stock.—*Dreeland v. Pascoe*, 290.

Pleadings—Amendments During Trial.

9. Amendments to pleadings during trial which do not change the nature of the action or mislead the adversary party to his prejudice are proper.—*Leggat v. Palmer*, 202.

Complaint—Prayer, No Part of—Amendments—Judgment.

10. The prayer is no part of the complaint and cannot be looked to to find support for the judgment; hence, the allowance of an amendment to the prayer asking for a larger sum than could be found due under the allegations of the complaint, did not authorize judgment for the greater amount.—*Leggat v. Palmer*, 202.

Personal Injuries—Complaint—Uncertainty—Nature of Injuries—Demurrer.

11. A special demurrer to the complaint in a personal injury action, which alleged that by reason of defendant city water company's negligence in shutting off the water from a tank connected with plaintiff's stove without her knowledge, an explosion occurred, and plaintiff was so injured and mentally disturbed thereby that being with the child, she lost the same, and became very sick, and on account thereof suffered great pain and injury, etc., was properly sustained. It was impossible to tell from the pleading whether the grievances complained of were the result of physical injury and mental disturbance, or of mental disturbance alone.—*Hosty v. Moulton Water Co. et al.*, 310.

Ejectment—Complaint—Sufficiency.

12. A complaint in ejectment by a city to recover possession of a strip of ground alleged to be a public street, which stated that the city was the owner of an easement in the property described, for street and highway purposes, that it was entitled to the immediate possession of the ground, and that defendant had taken possession of and was wrongfully withholding it, was sufficient.—*City of Butte v. Mikosowitz*, 350.

Estoppel—Pleading—Evidence—Admissibility.

13. Unless an estoppel is properly pleaded, evidence of acts constituting it is inadmissible.—*City of Butte v. Mikosowitz*, 350.

Mortgages—Deeds Absolute—Redemption—Tender.

14. Where a deed, absolute on its face, had been declared a mortgage, and the amount due was unliquidated and uncertain, the debtor in a subsequent suit to redeem was not required to plead a tender.—*Toole v. Weirick et al.*, 359.

Pleadings—Sufficiency—How Determined.

15. The sufficiency of a pleading must be determined from the facts from which the legal duty or liability is deduced.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Personal Injuries—Passengers—Cause of Derailment—Complaint—Surplusage.

16. Plaintiff, in an action against a railway company for injuries suffered while being transported as a passenger, need not allege or prove in his affirmative case the particular cause of a derailment; therefore, allegations of specific causes of the accident should be treated as surplusage, and he may rely upon his *prima facie* case without attempting to substantiate them.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Railroads—Cause of Derailment—Pleading and Proof.

17. In a personal injury action against a railway company where proof of the specific cause of derailment of a train is necessary to fix a liability upon defendant, the failure of plaintiff to make *prima facie* proof of one, at least, of the grounds of negligence alleged in the complaint is fatal, and proof of some other ground will not supply the defect.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Promissory Notes—Taking Security—When Bar to Action—Pleading.

18. To constitute the taking of security a bar to an action on a note, under section 6861, Revised Codes, it must be alleged that the security was in the form of a mortgage, or what the law would deem the equivalent of a mortgage; the statute is a limitation upon the rights which usually pertain to property, and its restriction will not be construed to include personal or collateral security, or any form of security not falling within the meaning of "mortgage."—*State Savings Bank v. Albertson et al.*, 414.

Illegality of Contract—Pleading and Proof.

19. Where defendants in an action on a promissory note had not alleged in their pleading that the purpose for which the note was given was illegal, they were properly denied permission to prove its illegal purpose.—*State Savings Bank v. Albertson et al.*, 414.

Trial—Amendments of Pleadings—Insufficiency of Affidavit—Discretion.

20. The trial court did not abuse its discretion in refusing defendants permission to amend their answer during trial, where the affidavit filed in support of the application did not negative the idea that the facts alleged in the proposed amendment were within the knowledge of defendants and their counsel from the commencement of suit.—*State Savings Bank v. Albertson et al.*, 414.

Promissory Notes—Taking Security—Pleading and Proof.

21. Plaintiff brought suit to recover on a promissory note. Defendants answered by alleging, *inter alia*, that plaintiff had taken "security" for the payment of the note. Section 6861, Revised Codes, provides that where a debt is secured by a mortgage upon real or personal property, recourse must be had to foreclosure proceedings. Defendants offered evidence to show that real estate had been conveyed to plaintiff to secure payment of the note. The court refused the offer. *Held*, that the court did not err, in that the allegation in defendants' answer that plaintiff had taken "security," was insufficient, under the rule declared in paragraph 18 above, to present an issue coming within the purview of the section, and the evidence was therefore irrelevant and immaterial.—*State Savings Bank v. Albertson et al.*, 414.

Complaint—Insufficiency—Objection—Time.

22. The objection that a complaint does not state a cause of action may be raised for the first time on a motion for a directed verdict, or at any time.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

Personal Injuries—Railroads—Passengers—Contributory Negligence—Complaint—Insufficiency.

23. Plaintiff's complaint in an action against a railroad company alleged that defendant's train on which he was a passenger, while slackening its speed when approaching his destination, did not stop;

that it was dark and he could not tell that the train was running at a great rate of speed; that he was directed by defendant's brakeman to jump, and did so, receiving the injuries complained of. *Held*, under *Kennon v. Gilmer*, 4 Mont. 433, that since the proximate cause of his injury was plaintiff's own act, to-wit, jumping off while the train was in motion, it was incumbent upon him to further allege facts sufficient to show that, in so doing, he was not guilty of contributory negligence, i. e., that he acted as a reasonably prudent person would have acted under like circumstances; having failed to so plead, his complaint did not state a cause of action.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

Contracts—Breach—Contingencies—Complaint.

24. Where plaintiff's right to recover, in an action for the breach of a contract, is contingent upon the happening of a future event, he must allege in his complaint that the contingency has arisen and that he has fully performed on his part.—*Sutton v. Lowry et al.*, 462.

Statute of Limitations—Pleadings.

25. The objection that an action looking to the reformation of a deed was not commenced within the time limited by law can be taken only by answer.—*American Min. Co., Ltd., v. Basin & Bay State Min. Co.*, 476.

Justices' Courts—Complaint—Sufficiency—Copy of Account.

26. *Held*, that the complaint in an action brought in a justice's court to recover the balance of an account for goods, wares and merchandise, reading as follows: "E. to M. & W. Dr. To balance for merchandise (describing it), \$255.12," was sufficient under sections 7005 and 7007, Revised Codes; *held*, further, that the word "account," as used in the latter section in declaring that a complaint in a justice's court may, *inter alia*, be "a copy of the account," does not mean a list of different items constituting it.—*Moran et al. v. Ebey*, 517.

Contracts—Illegality—Pleading.

27. The illegality of a contract, to be available as a defense, must be specially pleaded.—*Owens v. Davenport et al.*, 555.

Same—Illegality—Who may and may not Invoke Defense.

28. While either party to an agreement may raise the question of its illegality, it may not be invoked by a third party.—*Owens v. Davenport, et al.*, 555.

Special Damages—Pleading.

29. Special damages, i. e., damages which are the natural, but not the necessary, result of an injury, must be specially pleaded.—*Gordon v. Northern Pacific Ry. Co. et al.*, 571.

Contracts—Breach—Complaint—Insufficiency.

30. *Held*, that plaintiff's complaint, in an action for damages for deceit, alleging, in substance, that he had entered into an oral contract the provisions of which were subsequently reduced to writing, to sell, and sold, to defendant company his sheep ranch, etc.; that in the oral negotiations ending in the sale it was understood and agreed that after such sale defendant would make him manager of its sheep business; that the memorandum of sale did not contain any reference to his employment as manager, but that upon assurance by the president of defendant that this provision of the oral agreement would be carried out, he signed same; that such promise was the "most important condition of the agreement," and that but for such promise he would not have sold his property to defendant, did not state a cause of action and that a demurrer thereto was properly sustained.—*Kelly v. Ellis et al.*, 597.

PLEDGES.

See Deposit, 1-3.

PRESUMPTIONS.

POLICE POWER.

Right of state to protect public health,—see Prescription, 2.

POSTAL CLERKS.

When passengers,—see Personal Injuries, 19.

POWER DAMS.

See Injunction, 1-6.

POWERS.

Mode of exercise,—see Municipal Corporation, 10.

See, also, State Board of Examiners, 1; State Board of Health.

PRESCRIPTION.

See, also, Waters and Water Rights, 6-9.

Cities and Towns—Public Lands—Highways—How Established.

1. Section 2477, U. S. Rev. Stats., grants a right of way for the construction of highways over public lands, but does not specify the method by which the roadway is to be established. *Held*, that any acts by which the public might acquire a public roadway over private property, other than by purchase, were sufficient to constitute an acceptance of the grant, and that therefore evidence that a city had used a strip of ground for twelve or thirteen years as a public roadway under such a grant was ample to establish a road by prescription.—City of Butte v. Mikosowitz, 350.

Public Health—Police Power.

2. Prescription does not run against the right of the state to protect the public health by preventing the pollution of a stream which is a water supply for domestic uses; nor may the state waive or devote itself of its police power in this respect.—City of Miles City v. State Board of Health, 405.

PRESUMPTIONS.

Personal Injuries.

1. The law presumes that a person takes ordinary care of his own affairs, including his life.—Monson v. La France Copper Co., 50.

Legislative Enactments—Occupation Taxes—Classification.

2. The presumption obtains that the legislature in enacting a law imposing an occupation tax, exercised a reasonable discretion in making a classification.—Quong Wing v. Kirkendall, 64.

Witnesses—Oath.

3. Where a witness had been examined and cross-examined in a justice's court, the presumption attaches that the justice administered the oath to the witness before permitting him to testify.—Mette & Kanne Distilling Co. v. Lowry et al., 124.

Life Insurance—Proof of Death—Mailing.

4. Where proof of death was mailed to the home office of defendant insurance company at New York by registered letter, the presumption obtains that it was received in due course of mail.—McAuley v. Casualty Company, 181.

Official Duty—Performance.

5. The presumption is that official duty has been properly performed.—State v. Powers, 259.

Evidence—Admission of Fact Presumed—Not Error.

6. Error cannot be predicated upon the admission of evidence to establish a fact which may be presumed to exist.—Golden v. Northern Pacific Ry. Co., 435.

PRINCIPAL AND SURETY.

Interest on deposit,—see Deposit, 1-3.

PROMISSORY NOTES.

See Negotiable Instruments.

PUBLIC HEALTH.

Pollution of streams,—see Municipal Corporations, 22-25.

PUBLIC LANDS.

1. Ditches across,—see Waters and Water Rights, 1-4.
2. Grants for highways,—see Municipal Corporations, 16-20.

QUANTUM MERUIT.

Conditional sale of livestock, breach by seller,—see Sales, 8.

QUIETING TITLE.

Injunctive relief,—see Waters and Water Rights, 2.

QUO WARRANTO.

See Clerk of District Court, 2.

RAILWAYS.

Crossings,—see Personal Injuries, 5-13.

Ejecting trespassers from train,—see Personal Injuries, 24-26.

Injuries to passengers,—see Personal Injuries, 19-23, 27, 28.

Removal of cause to federal court,—see Removal of Causes, 1-3.

Brakemen—Scope of Authority—Ejecting Trespassers.

1. The presumption obtains that a brakeman on a freight train has, *prima facie*, authority, by virtue of his employment, to eject trespassers therefrom.—Golden v. Northern Pacific Ry. Co., 435.

REAL PROPERTY.

See, also, Mortgages.

Cancellation of deeds,—see Trusts and Trustees, 3, 4.

Sale on commission,—see Brokers, 1.

Agreement to Convey—Measure of Damages—Bad Faith.

1. Section 6054, Revised Codes, declaring the measure of damages in an action for breach of an agreement to convey an estate in real property, and authorizing recovery of additional damages in case of bad faith, applies to an agreement to convey an equitable as well as a legal estate.—Ross v. Saylor, 559.

Same—Complaint—Sufficiency.

2. Complaint examined and *held* not to state two separate and distinct causes of action, to-wit, one for breach of a contract to convey real property, and one for damages in tort, as for a fraud, but one to recover damages for a breach of the oral contract alleged to have been entered into.—Ross v. Saylor, 559.

Same—Statute of Limitations—Inapplicability of Defense—Striking Pleading Harmless Error.

3. Plaintiff's action having been one to recover damages for breach of an oral agreement to convey real property, and not one based upon fraud, the striking of defendant's plea that it was barred by

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the statute fixing the time within which actions for relief on the ground of fraud must be brought, was not prejudicial. The defense was inapplicable.—*Ross v. Saylor*, 559.

Same—Bad Faith—Evidence—Admissibility.

4. Where plaintiff sought to recover damages because of defendant's failure to carry out an oral agreement to convey to him an estate in certain lands in Nebraska, represented by certificates which entitled the holder to the land therein named, and which had been assigned to plaintiff in exchange for land owned by him in this state, but which Nebraska lands had theretofore been sold by defendant's agent to another, evidence that defendant had told plaintiff that the title to the land in Nebraska was clear, was admissible to show the bad faith of defendant in the transaction.—*Ross v. Saylor*, 559.

Same—Bad Faith—Proper Cross-examination.

5. Defendant's wife, after having testified in his behalf, was asked on cross-examination to identify certain letters written by her as his agent. The letters disclosed the fact that defendant knew that his Nebraska land had been sold by his agent prior to the date of his agreement to convey to plaintiff. *Held*, that the letters were properly admitted on cross-examination.—*Ross v. Saylor*, 559.

Same—Measure of Damages—Instructions—Inapplicability—Harmless Error.

6. The giving of an instruction on the measure of damages, which, though inapplicable to the case as tried, could not have added anything to the measure of relief to which plaintiff was clearly entitled under section 6054, Revised Codes, and the state of facts proven, was not sufficient to work a reversal of a judgment in his favor, nothing appearing that a different result could be reached on a retrial.—*Ross v. Saylor*, 559.

Same—Bad Faith—Measure of Damages—Expenses Recoverable.

7. *Held*, in an action to recover damages for a breach of an agreement to convey real property, that expenses incurred by plaintiff in removing his family to Nebraska preparatory to taking possession of lands sold to him by defendant, as well as counsel fees and court costs paid by plaintiff in defending an action to quiet title, brought against him by defendant's prior grantee, were recoverable as "expenses properly incurred in preparing to enter upon the land," under section 6054, Revised Codes.—*Ross v. Saylor*, 559.

Same—Expenses Recoverable—Verdict—Sufficiency.

8. In the absence of an objection to it at the trial, the jury's verdict in a certain sum for "necessary expenses in preparing to take possession of the land," instead of for "expenses properly incurred,"—the words of the statute (sec. 6054, Revised Codes), and those used in the court's instructions,—was sufficient.—*Ross v. Saylor*, 559.

RECORDATION OF INSTRUMENTS.

Notice,—see Deeds, 1, 2.

RECORD ON APPEAL.

Dismissal—Defective Record.

1. An appeal from an order denying a new trial will be dismissed where a copy of the order denying the motion is not incorporated in the transcript.—*Hale v. County of Jefferson et al.*, 137.

Same—Faulty Record.

2. Where the record on appeal in an action against three defendants showed a judgment against one only, and a joint notice of all defendants recited that they intended "to move the court to vacate the verdict

rendered against *them*, and to grant a new trial thereof," while the order of the court denying the motion referred to only one of defendants, the attempted appeals will be dismissed. (MR. JUSTICE SMITH dissenting.)—*Hall v. Butte Electric Ry. Co.*, 144.

Amendment After Perfecting Appeal.

3. After an appeal has been perfected, the district court is without jurisdiction to amend the judgment by adding costs.—*Butte Northern Copper Co. et al. v. Radmilovich*, 157.

New Trial—Form of Assignments—Presumptions.

4. Though the ground on which a new trial had been asked was stated by the judge in his certificate authenticating the record on appeal in an equity case, to have been that the evidence failed to support the judgment, and such ground is not one of those enumerated in section 6794, Revised Codes, yet where appellants in their brief made the statutory assignment that the evidence was insufficient to justify the court's decision, and counsel for respondent argued the assignment on its merits, the supreme court will assume that the trial judge intended to state that the matter was properly submitted to him.—*Foster et al. v. Winstanley et al.*, 314.

New Trial Order—Opinion of District Court—Not Part of Record.

5. Where a motion for a new trial, made on several of the statutory grounds, is sustained by an order general in its terms, the supreme court in its review is not restricted to a consideration of the reason for his action given by the judge in a memorandum opinion attached to the order; such opinion is not a part of the record on appeal; but if the order can be justified upon any of the grounds of the motion, it will be affirmed.—*Winnicott v. Orman et al.*, 339.

Same—Record—Sufficiency.

6. Where the record on appeal from a new trial order, made upon the minutes of the court, contains all the papers enumerated in sections 6799 and 7114, Revised Codes, and the certificate of the trial judge recites that the statement of the case is true and correct, it will be held to contain all the minutes.—*Sutton v. Lowry et al.*, 462.

REFORMATION.

See Deeds, 1-3.

RELATION BACK, DOCTRINE OF.

Amendments of pleadings,—see Pleading and Practice, 7.

Highways—Public Lands—Grants.

1. An acceptance of a grant of public land for highway purposes, under section 2477, U. S. Rev. Stats., relates back to the date of the grant or dedication, and one taking such land after acceptance by a municipality, does so subject to the rights which the public has acquired.—*City of Butte v. Mikosowitz*, 350.

REMEDIES.

1. Breach of conditional sale contract,—see Sales, 6, 7, 8.
2. Election of,—see Election of Remedies.

REMOVAL OF CAUSES.

Diverse Citizenship—Petition—Failure to File in Time—Waiver.

1. In a personal injury action brought jointly against a railway company (a citizen of another state) and one of its employees (a citizen of Montana, upon whom service of summons had never been had), on the day set for trial both parties announced that they were ready for

trial, counsel for defendant company then knowing that its codefendant was not subject to the court's jurisdiction. After the cause had proceeded to the point where plaintiff was about to rest his case, counsel for the railway company filed a petition for removal of the cause to the federal circuit court, on the ground that its codefendant was present in court, but that plaintiff refused to serve him with process, that such refusal showed that the action against both defendants had been brought in bad faith so as to prevent removal, and that the cause was then one wholly between citizens of different states, and therefore removable. Upon objection that the petition was presented too late, the motion was denied. *Held*, that the announcement by plaintiff that he was ready for trial amounted to notice to defendant company that he had elected to proceed against it alone; that the cause thus became at once removable because of the diverse citizenship of the parties; and that by failure to then file its petition for removal, defendant waived the privilege granted by the federal statute (U. S. Comp. Stats., 1901, secs. 2, 3, pp. 509, 510.)—*Golden v. Northern Pacific Ry. Co.*, 435.

Same—Jurisdiction of State Court.

2. Every court has the power to determine the question of its own jurisdiction, such determination being subject to review by the courts which have jurisdiction for that purpose; and this rule applies to the right of a state court to determine its jurisdiction upon the filing of a petition for removal of the cause to the federal court.—*Golden v. Northern Pacific Ry. Co.*, 435.

Removal After Appeal—Jurisdiction of Supreme Court.

3. The contention that the state supreme court should either reverse the action of the district court in refusing to remove the cause to the federal court, or refrain from action, because the latter court, since the filing of the record on appeal, had taken jurisdiction as evidenced by an order overruling a motion to plaintiff to remand it to the district court, has no merit, since it may not be assumed that the lower court erred merely because of the action taken by the federal court; nor does it necessarily follow that the latter tribunal, in taking jurisdiction, did so properly.—*Golden v. Northern Pacific Ry. Co.*, 435.

REPLEVIN.

See Claim and Delivery.

RES ADJUDICATA.

See Estoppel, 2.

RIGHTS OF WAY.

For ditches across public lands,—see Drains, 1-4; Waters and Water rights, 1-4.

ROBBERY.

See Criminal Law, 27-32.

RULES OF COURT.

District Courts—Construction—Review.

1. It is within the province of the district court to construe its own rules, and the supreme court will not interfere therewith, unless the construction is clearly unreasonable and erroneous.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

Same—Costs—Number of Witnesses.

2. Under a rule of the district court that in all civil actions not more than five witnesses should be examined as to "any question of fact or issue in the cause," the phrase quoted *held* to refer to any single, substantial allegation of the pleadings on which an issue is raised, and not

to the ultimate fact to be determined; therefore where several grounds of negligence were alleged by plaintiff in a personal injury action against a railway company, he could not complain that defendant, on nonsuit, was allowed costs of witnesses brought into court to disprove such allegations.—*Hoskins v. Northern Pacific Ry. Co.*, 394.

SALES.

Pleading and Proof—Variance.

1. The complaint alleged that plaintiff had sold and delivered to defendant 2,000 shares of the capital stock of a mining company for a named sum. The proof showed that a block of 9,500 shares, including that of plaintiff and others, had been placed in the hands of one R. for sale and sold to defendant, but that plaintiff's stock had been returned by the latter to R. with the request to hold it for him (defendant) for a short time, when he would take the stock and pay for it, which he failed to do. *Held*, that by returning plaintiff's stock to R. there was such a severance from the block sold to defendant in the first instance, as to permit plaintiff to recover on the promise of defendant to pay for it, and that the claim that there was a variance between the allegations of the complaint and the proof had no merit.—*Avery v. Wall*, 73.

Transfer of Title—Delivery to Carrier.

2. When goods ordered in the ordinary course of trade are not directly delivered to the purchaser, but are turned over to a carrier for delivery, title to them is deemed to be vested in the vendee, subject to the right of stoppage *in transitu*. The latter, on receipt of them, has a reasonable time within which to inspect them, and he is bound to accept them, only when they are in quality and description such as the purchaser ordered.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Action for Price—Burden of Proof.

3. One who seeks to recover the contract price of goods shipped on order is bound to show by a preponderance of evidence that they are of the kind and quality ordered.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Same—Evidence—Admissibility.

4. On an issue whether whisky was of the brand and quality ordered, the defendant buyer was properly permitted to show that the barrels containing it were received by him in apparently the same condition as when shipped, and that they had not been tampered with after being stored in his cellar or their contents adulterated.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

General Denial—Evidence Admissible.

5. In an action for the price of goods to be shipped on order, proof that the plaintiff failed to ship goods of the quality ordered is admissible under a general denial.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Conditional—Breach by Buyer—Seller's Remedies.

6. On the breach of a conditional sale contract by the buyer, the seller may treat the contract as rescinded and retake the property; or retake the property and still treat the contract as in force, but broken by the buyer, and sue for damages occasioned by the breach; or waive the breach and insist upon payment for the property.—*Madison River Livestock Co. v. Osler et al.*, 244.

Same—Wrongful Retaking of Property—Effect.

7. Where the retaking of personal property sold under a conditional sale, is wrongful, the action of the seller constitutes a violation of the contract, and the buyer may treat it as rescinded.—*Madison River Livestock Co. v. Osler et al.*, 244.

Same—Livestock—Rescission of Contract—Counterclaims—*Quantum Meruit*.

8. Where livestock was sold conditionally and the seller wrongfully retook the same, the buyers could treat the contract as rescinded, and, in an action by the former to recover on a note evidencing the latter's indebtedness under the contract, maintain their counterclaim on the *quantum meruit*, for pasturage and labor performed in handling the stock.—*Madison River Livestock Co. v. Osler et al.*, 244.

Same—Retaking of Property—Election—Effect.

9. Where a seller of livestock which had been sold conditionally elected to treat the contract of sale as rescinded because of an alleged breach of it by the buyer and retake the property, he elected to take it as he found it, and could not thereafter insist upon payment for animals which had died while in the buyer's possession.—*Madison River Livestock Co. v. Osler et al.*, 244.

Same—Breach of Contract—Evidence.

10. Defendants agreed to provide feed for livestock conditionally sold to them, to the amount of 400 tons annually. The evidence showed that they had only 235 or 250 tons between the time the agreement was entered into and the time the animals were retaken by the seller. *Held*, that this fact alone did not constitute a breach of the contract on their part, so as to entitle plaintiff to reclaim the property. A substantial compliance was sufficient, and if the amount of hay provided was ample to feed the stock during the time feeding was necessary (as the jury found), plaintiff's action in retaking it was wrongful.—*Madison River Livestock Co. v. Osler et al.*, 244.

When Agreement Unenforceable.

11. *Held*, under section 4999, Revised Codes, that, where defendant requested plaintiff, firm, at the solicitation of one of its traveling salesmen, on one of its printed order blanks covering many pages and containing a large variety of all kinds of jewelry of different quality and price, to ship to him "the goods listed in this order upon the terms named therein," and it could not be determined therefrom how many articles of any particular kind or class had been ordered or what prices were to be paid, the memorandum of sale was so indefinite and uncertain in its terms as to make it unenforceable at law.—*Price et al. v. Stipek*, 426.

SECURITY.

Taking of, when bar to action on promissory note,—see *Negotiable Instruments*, 2, 3.

SEWAGE.

Pollution of streams,—see *Municipal Corporations*, 22-25.

SLANDER.**Justices of the Peace—Jurisdiction.**

1. Under section 66, Code of Civil Procedure, 1895, a justice of the peace court had jurisdiction of an action for slander, commenced prior to the amendment of said section (*Laws* 1907, p. 186), where the damages claimed did not exceed \$300.—*McKenzie v. Doran et al.*, 593.

SPECIAL DAMAGES.

Pleading,—see *Personal Injuries*, 29, 30.

SPECIAL PROCEEDINGS.

Appeal,—see *Appeal and Error*, 4.

STATE BANKS.

Extension of Corporate Existence—Statutes Applicable.

1. *Held*, on *mandamus* against the Secretary of State, that the provisions of sections 3826-3828, Revised Codes, touching the manner in which a corporation may extend its existence, do not apply to state banks, but that section 3907 governs in this respect; and that therefore such a bank was not required to give a notice of six weeks of its intention to extend its corporate existence.—State ex rel. Cascade Bank v. Yoder, 202.

Increase of Capital Stock—Statutes Applicable.

2. A state bank, organized in 1889, properly proceeded, in 1891, under section 526, Chapter 27, Fifth Division Compiled Statutes of 1887 [sec. 3918, Revised Codes], to increase its capital stock, and was under no obligation to give a six weeks' notice of a meeting of its stockholders to consider the question. Section 468, Chapter 25, Fifth Division, Compiled Statutes of 1887 [sec. 3827, Revised Codes], which required such a notice, had reference to corporations other than state banks.—State ex rel. Cascade Bank v. Yoder, 202.

STATE BOARD OF EXAMINERS.

See, also, Supreme Court.

Powers—Constitution—Statutes.

1. Section 20, Article VII, of the Constitution, and section 226, Revised Codes, empowering the state board of examiners to examine all claims against the state, except salaries of officers fixed by law, apply to unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of the state government having authority to fix them.—State ex rel. Schneider v. Cunningham, 165.

STATE BOARD OF HEALTH.

Power to prevent pollution of streams,—see Municipal Corporations, 22-25.

STATUTE OF LIMITATIONS.

General Verdict—Effect.

1. Where defendant, in an action in ejectment by a city, failed to submit any special interrogatories upon the question whether plaintiff's action was barred by the statute of limitations, he was bound by the general verdict in his favor upon all the issues.—City of Butte v. Mikosowitz, 350.

Pleadings.

2. The objection that an action was not commenced within the time limited by law must be taken by answer.—American Min. Co. Ltd. v. Basin & Bay State Min. Co., 476.

Reformation—Deeds—Recordation—Notice.

3. *Held*, that the recording of an instrument sought to be reformed, after the statute of limitations had run, because of a mutual mistake of the parties to it, is not alone sufficient to charge plaintiff with constructive notice of such mistake; but that, in determining the question of notice, either actual or constructive, the recording is to be considered with other facts and circumstances.—American Min. Co. Ltd. v. Basin & Bay State Min. Co., 476.

Same—Pleadings—Insufficiency.

4. Defendants, in attempting to plead the statute of limitations, set forth a section of the statute which had no application; they further alleged that the deed had been recorded, that more than five years had

elapsed since the date of recordation, and that therefore the action was barred. *Held*, that, conceding (but not deciding) that by pleading "the facts showing the defense," to-wit, the recording of the instrument and the lapse of five years thereafter, the requirements of section 6575, Revised Codes, relative to the pleading of the statute, were met, the facts so stated were insufficient, under the rule announced in paragraph 3 above, to justify the district court in holding plaintiff's cause of action barred.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

Equity—Laches.

5. *Obiter*: Defendant in an equity case may avail himself of the laches of plaintiff, notwithstanding the statute of limitations has not expired, or in cases where he has neglected to plead the statute or elected not to do so.—*American Min. Co. Ltd. v. Basin & Bay State Min. Co.*, 476.

Real Property—Failure to Convey—Inapplicability of Defense.

6. Plaintiff's action having been one to recover damages for breach of an oral agreement to convey real property, and not one based upon fraud, the striking of defendant's plea that it was barred by the statute fixing the time within which actions for relief on the ground of fraud must be brought, was not prejudicial. The defense was inapplicable.—*Ross v. Saylor*, 559.

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STATUTES AND STATUTORY CONSTRUCTION.

Statutes—Constitutionality.

1. A statute may not be declared unconstitutional unless it is clearly so.—Quong Wing v. Kirkendall, 64.

Occupation Tax—Constitutionality—Burden of Proof—Presumptions.

2. The burden of showing that a statute imposing a license tax is unconstitutional as denying the equal protection of the laws, in that the classification therein made is arbitrary, unreasonable or unjust, rests upon plaintiff. The presumption obtains that the legislature in enacting it exercised reasonable discretion in making the classification.—Quong Wing v. Kirkendall, 64.

Same—Laundries—Statutes—Constitutionality.

3. Assuming that section 2776, Revised Codes, providing that every person engaged in the laundry business, other than steam laundry business, shall pay a license fee of \$10 per quarter, etc., classifies laundries for license purposes [which is doubted], into steam laundries and laundries operated by hand, such classification held not arbitrary or unwarrantable.—Quong Wing v. Kirkendall, 64.

Occupation Tax—Equal Protection of Laws.

4. The legislature is not required to tax all occupations, equally or uniformly; hence it had power to single out proprietors of hand laundries and compel them to pay a license; and so long as the law was uniform as to all persons operating such laundries, there was no denial of the equal protection of the laws.—*Quong Wing v. Kirkendall*, 64.

Same—Laundries—Discrimination.

5. Section 2776, Revised Codes, imposing a license fee of \$10 per quarter upon every person engaged in the laundry business, other than steam laundries, is not unconstitutional because it exempts from its operation women engaged in such business, provided not more than two are employed or kept at work.—*Quong Wing v. Kirkendall*, 64.

Municipal Corporations—Ordinances—Initiative and Referendum Statute—Inapplicability.

6. The provision of section 3268, Revised Codes, that no ordinance passed by the council of a city shall become effective until thirty days after its passage, which section is a part of the initiative and referendum law applicable to cities (Revised Codes, secs. 3266-3276), has no application to an ordinance providing for the issuance of water and sewer bonds after sanction of the taxpayers affected thereby has been obtained. The law has to do with matters of general legislation on which all electors, whether taxpayers or not, may vote, while the question whether bonds shall be issued can be submitted to taxpayers only.—*Carlson v. City of Helena*, 82.

Statutes—Constitutionality—How Determined.

7. An act of the legislature will not be declared invalid as repugnant to the Constitution except where the repugnancy is established beyond a reasonable doubt.—*State ex rel. Peyton v. Cunningham*, 197.

Legislative Powers—Force of Joint Resolutions.

8. No Act of legislation has the force of law, even though unanimously passed and approved by the governor, unless the requirements of the Constitution (Article V, secs. 19, 20, 23), that every law shall be passed by bill, that it must have an enacting clause, and a title clearly expressing the subject of the enactment, are met; hence a resolution in the passing of which neither of these essentials has been observed, is not an authoritative expression of the legislative will upon the subject with which it deals.—*State ex rel. Peyton v. Cunningham*, 197.

Same—Joint Resolution—Creation of Office—Invalidity—*Mandamus*.

9. *Held*, under the rule last above declared, that House Joint Resolution No. 13 (Laws 1909, p. 390), conferring authority upon the state game warden to appoint the widow of a deputy warden, who was killed in the discharge of his duties, a deputy in addition to those authorized by Chapter 87, Laws of 1909 (p. 118) is invalid; *held*, further, on *mandamus*, that the state auditor properly refused to issue a warrant to relatrix for services performed as such deputy warden.—*State ex rel. Peyton v. Cunningham*, 197.

State Banks—Extension of Corporate Existence—Statutes Applicable.

10. *Held*, on *mandamus* against the Secretary of State, that the provisions of sections 3826-3828, Revised Codes, touching the manner in which a corporation may extend its existence, do not apply to state banks, but that section 3907 governs in this respect; and that therefore such a bank was not required to give a notice of six weeks of its intention to extend its corporate existence.—*State ex rel. Cascade Bank v. Yoder*, 202.

Same—Increase of Capital Stock—Statutes Applicable.

11. A state bank, organized in 1889, properly proceeded, in 1891, under section 526, Chapter 27, Fifth Division Compiled Statutes of 1887

[sec. 3918, Revised Codes], to increase its capital stock, and was under no obligation to give a six weeks' notice of a meeting of its stockholders to consider the question. Section 468, Chapter 25, Fifth Division, Compiled Statutes of 1887 [Sec. 3827, Revised Codes], which required such a notice, had reference to corporations other than state banks.—*State ex rel. Cascade Bank v. Yoder*, 202.

Statutes—Constitutionality—Determination.

12. Unless the necessity of passing upon the constitutionality of a statute is urgent and imperative, the supreme court will not do so on appeal.—*Sanden v. Northern Pac. Ry. Co.*, 209.

Legislative Procedure—Enrolled Bill—Conclusiveness.

13. An enrolled bill, bearing the signatures of the presiding officers of the two Houses and the approval of the governor, is conclusive upon the courts, and, in determining whether an Act has been properly passed, recourse may not be had to any other evidence, except where the alleged invalidity of an Act is based upon a failure to enter the names of those voting upon its final passage, in which case the journals may be consulted.—*State ex rel. Gregg v. Erickson et al.*, 280.

Lincoln County—Validity—Act Creating.

14. *Held*, that the Act of March 9, 1909 (Laws 1909, p. 193), creating Lincoln county, and providing for its organization and government, in failing to provide any compensation for the county superintendent of schools, is not upon its face so defective as to defeat its purposes.—*State ex rel. Gregg et al. v. Erickson et al.*, 280.

Pledge—Interest.

15. Section 6046, Revised Codes, providing that acceptance of payment of the principal waives all claim to interest, has no application to moneys deposited to indemnify sureties on a bond against loss.—*Leggat v. Palmer*, 302.

Foreign Corporations—"Carrying on" of Business—What does not Constitute.

16. *Held*, that the shipping of beer into the state by a foreign corporation and selling the same to a distributing agent did not constitute a carrying on of business in the state within the meaning of section 4413, Revised Codes, relating to the steps necessary for such a corporation before it can carry on business in Montana.—*Uihlein v. Caplice Commercial Co.*, 327.

Corporations—Holding Property—Statutes—Applicability.

17. *Held*, that section 3823, Revised Codes, declaring that a corporation cannot hold property in a county, or maintain an action in relation thereto, unless it has first filed a certified copy of its articles of incorporation in the office of the county clerk, applies to domestic corporations only.—*Uihlein v. Caplice Commercial Co.*, 327.

Trial by Court—Decision—Time of Rendition—Directory Statute.

18. Section 6763, Revised Codes, providing that upon a trial of a question of fact by the court, its decision or findings must be filed within twenty days after submission of the case, is directory only, and its failure to render a decision within the time limited does not deprive it of jurisdiction to decide at a later date.—*Toole v. Weirick*, 359.

Adoption from Other State—Construction.

19. Where a statute is adopted from another state, the construction given to it by the supreme court of that state is also adopted.—*State Savings Bank v. Albertson et al.*, 414.

STREETS.

See Municipal Corporations, 15-20.

SUPREME COURT.

Review of findings in equity cases,—see Equity, 1.

Assistants—Power to Appoint—Compensation—Liquidated Claim.

1. Where the state has failed to make provision for necessary assistants to the supreme court, the court may, both under its inherent power and under the authority conferred by section 6248, Revised Codes, select and appoint them, and make the compensation due them for their services a charge against the state as a liquidated claim.—State ex rel. Schneider v. Cunningham, 165.

Same—State Board of Examiners—Powers.

2. Section 262, Revised Codes, authorizing the board of examiners to employ clerical help from any state officer or board, and prohibiting such officers or boards from employing clerks without the authority of the board of examiners, does not apply to the employees of the supreme court; it, viewed as a department of the state government, not being an officer or board within the terms of the provision.—State ex rel. Schneider v. Cunningham, 165.

Stenographer—Compensation—Liquidated Claim.

3. *Held*, on *mandamus* to the state auditor, that, where by general appropriation bill provision for the compensation of the stenographer of the supreme court had been made, his claim for salary earned was not an unliquidated claim which required approval of the board of examiners before issuance of warrant.—State ex rel. Schneider v. Cunningham, 165.

Same—General Appropriation Bill.

4. The declaration in a general appropriation that the sums named therein, "or so much thereof as may be necessary," are appropriated for the purposes named, has no reference to the salary of the stenographer of the supreme court as fixed therein, so as to empower the state board of examiners to fix a smaller amount. Any discretion in this regard is addressed to the supreme court, vested with the power to appoint such officer and control the disbursement of the sum thus appropriated.—State ex rel. Schneider v. Cunningham, 165.

Removal of Cause After Appeal—Jurisdiction.

5. The contention that the state supreme court should either reverse the action of the district court in refusing to remove the cause to the federal court, or refrain from action, because the latter court, since the filing of the record on appeal, had taken jurisdiction as evidenced by an order overruling a motion of plaintiff to remand it to the district court, has no merit, since it may not be assumed that the lower court erred merely because of the action taken by the federal court; nor does it necessarily follow that the latter tribunal, in taking jurisdiction, did so properly.—Golden v. Northern Pac. Ry. Co., 435.

SURPLUSAGE.

Murder—Information, date of death of deceased,—see Criminal Law, 21.

Passengers, allegations of specific cause of railroad accident,—see Personal Injuries, 16.

TAXATION.

Ditches Appurtenant to Placer Claims—When Exempt.

1. *Held*, that a ditch, appurtenant to placer claims, which had always been used to convey water for mining such claims, and for no other purpose, and which, independently of such use, had never been the source of revenue to its owner, although the water could be sold for

irrigation and other purposes and would be valuable in this connection, had no value independent of its use in connection with the placer lands so as to render it subject to taxation under section 2500, Revised Codes.—*Hale v. County of Jefferson et al.*, 137.

Same—Exemption—Burden of Proof.

2. One claiming an exemption from taxation has the burden of showing that he is entitled to it; but in an action to enjoin the collection of taxes upon a ditch used solely in connection with placer mining operations and therefore not subject to taxation, the burden rests upon the state to show that the ditch has a value independent of the placer mining claim, so as to render it liable to taxation as provided in section 2500, Revised Codes.—*Hale v. County of Jefferson et al.*, 137.

Same—Exemption—Estoppel.

3. Though the owner of the ditch referred to in the paragraphs above, had for many years submitted to the payment of taxes thereon upon a valuation fixed by himself (because demanded by the assessor), he was not estopped to question the right of the state to continue to make the unauthorized imposition.—*Hale v. County of Jefferson et al.*, 137.

TENDER.

See Pleading and Practice, 5, 14.

THEORY OF CASE.

Appeal—Review.

1. Where a cause was tried on a theory adopted by plaintiff's counsel, he will not be heard to complain on appeal that such theory was wrong.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Instructions.

2. Where a cause is tried upon a certain theory, the losing party cannot on appeal complain of an instruction covering such theory.—*Yerg v. Helena L. & Ry. Co. et al.*, 213.

TRANSCRIPT.

See Record on Appeal.

TRESPASSERS.

On railroad trains,—see Personal Injuries, 24-26.

TRIAL.

See Discretion—Exceptions—Findings—Instructions—Nonsuit—Objections—Offer of Proof—Pleading and Practice—Verdicts; see, also, Criminal Law.

TRUSTS AND TRUSTEES.

Enforcement—Complaint—Sufficiency.

1. A complaint which alleged that plaintiff and defendant were co-owners in a mining claim; that defendant sold the property and received therefor as part compensation 5,000 shares of the capital stock of a certain company; that a certificate calling for the entire 5,000 shares had been issued to defendant who had refused to transfer to plaintiff the number of shares belonging to him, stated a cause of action for the enforcement of a trust in the stock.—*Dreeland v. Pascoe*, 290.

Same—Counterclaims—Burden of Proof.

2. Where, in a suit to enforce a trust in corporate stock, defendant admitted the allegations of the complaint, save that plaintiff was entitled to the stock, and urged as a defense a counterclaim constituting

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Same—Counterclaims—Burden of Proof.

2. Where, in a suit to enforce a trust in corporate stock, defendant admitted the allegations of the complaint, save that plaintiff was entitled to the stock, and urged as a defense a counterclaim constituting

a lien on the stock, defendant had the burden of proof.—*Dreeland v. Pascoe*, 290.

Cancellation of Deed—Evidence—Sufficiency.

3. Evidence, in an action to set aside a conveyance of real property alleged to have been made by plaintiff's agent in breach of his trust, *held* sufficient to support the court's decision in favor of plaintiffs.—*Foster et al. v. Winstanley et al.*, 314.

Same—Cancellation of Deed—Consideration—Antecedent Debt—Bona Fide Purchaser.

4. One to whom a transfer of real estate was made without present consideration, and merely for the purpose of securing an antecedent debt, did not occupy the position of an innocent purchaser; therefore, since he had parted with nothing of value, the cancellation of the deed resulted in no loss to him and he has no cause for complaint.—*Foster et al. v. Winstanley et al.*, 314.

Profits—Accounting—Fixing Compensation—Complaint—Insufficiency.

5. The heirs of a decedent and certain claimants entered into a trust agreement whereby the trustees appointed were to receive and hold moneys derived from the estate, until final distribution. When the trust had been partly executed, and before final distribution of the estate, one of the parties to the contract brought suit against the trustees asking, among other things, that they be made to account for profits received by them from moneys in their hands, and that their compensation be fixed. The complaint did not state to whom the funds belonged, or whether the trustees had made any profit from their use; neither was there any allegation that demand had been made upon them for such profits, nor that they had not been paid for their services or were claiming any compensation for them. *Held*, that the complaint was insufficient to give a court of equity jurisdiction for the purposes stated, and that a demurrer thereto was properly sustained.—*Coram et al. v. Davis et al.*, 495.

Termination of Trust—Equity.

6. *Obiter*: Where the objects of a trust agreement have been accomplished, and there is no longer any necessity for the intervention of the trustees, a court of equity will abrogate it, in a proper case, and its decision is of no concern to the trustees.—*Coram et al. v. Davis et al.*, 495.

Same—Trustees—Improper Parties—Complaint—Insufficiency.

7. A party invoking the aid of a court of equity, must show affirmatively a necessity for its intervention; hence, where plaintiff's complaint in an action against the trustees seeking the abrogation of the trust agreement under which they were appointed, made no claim that the defendants had not properly fulfilled their trust, or that the agreement could not be terminated by the parties to it without the intervention of the court, or that complete relief could not be afforded plaintiffs without the presence of the trustees as parties, it was insufficient, and did not state a cause of action against the latter.—*Coram et al. v. Davis et al.*, 495.

VARIANCE.

Pleading and Proof.

1. The complaint alleged that plaintiff had sold and delivered to defendant 2,000 shares of the capital stock of a mining company for a named sum. The proof showed that a block of 9,500 shares, including that of plaintiff and others, had been placed in the hands of one R. for sale and sold to defendant, but that plaintiff's stock had been returned by the latter to R. with the request to hold it for him (defendant) for a short time, when he would take the stock and pay for it, which he failed to do. *Held*, that by returning plaintiff's stock to R.

there was such a severance from the block sold to defendant in the first instance, as to permit plaintiff to recover on the promise of defendant to pay for it, and that the claim that there was a variance between the allegations of the complaint and the proof had no merit.—*Avery v. Wall*, 73.

VENUE.

See Criminal Law, 24.

VERDICTS.

Excessive,—see, also, New Trial, 1-3, 6.

Contrary to Law—Instructions.

1. A verdict cannot be said to be contrary to the law as declared by the court, where under its instructions the jury could have found the issue for either party.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Insanity—Verdict of Acquittal—Form.

2. Where defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that they might find defendant guilty of assault in the first, second or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." (Revised Codes, sec. 9322.)—*State v. Crowe*, 174.

Excessive—Jury—Passion and Prejudice.

3. In awarding damages claimed to be excessive, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors, if the verdict is based on competent testimony, in accordance with instructions of the court, and easily to be arrived at by mathematical calculation.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

Personal Injuries—Excessive Verdict—Remission of Excess—New Trial.

4. Held, in an action to recover damages for the negligent killing of plaintiff's husband, that a verdict for \$40,000 was excessive, and a new trial ordered unless plaintiff consent to a reduction of the judgment to \$15,000.—*Yergy v. Helena L. & Ry. Co. et al.*, 213.

General Verdict—Effect.

5. Defendant, not having submitted any special interrogatories upon the question whether plaintiff city's right of action was barred by the statute of limitations, was bound by the general verdict in plaintiff's favor upon all the issues.—*City of Butte v. Mikosowitz*, 350.

Directed—Objection—Insufficiency of Complaint—Time.

6. The objection that a complaint does not state a cause of action may be raised for the first time on a motion for a directed verdict, or at any time.—*Badovinac v. Northern Pacific Ry. Co.*, 454.

Impeaching Verdict—Affidavits of Jurors—Inadmissibility.

7. The provision of section 6794, subdivision 2, Revised Codes, that the affidavits of jurors may be used to impeach a verdict only when it was reached by resort to chance, is exclusive; hence, an affidavit of a juror, relating to a conversation had with another juror touching the latter's misconduct, was incompetent; as was also that of one, not a juror, as to the contents of an affidavit of the offending juror, for the same and the additional reason that it was hearsay.—*Sutton v. Lowry et al.*, 462.

New Trial—Insufficiency of Evidence—Conclusiveness of Verdict.

8. The question of the credibility of witnesses is primarily addressed to the jury, and their verdict, in an action at law, sought to be set
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aside on the ground that the evidence was insufficient to justify it, should only be set aside for the most cogent reasons.—*Sutton v. Lowry et al.*, 462.

Directed—Plaintiff's Evidence—Truth of, to be Assumed.

9. On motion for a directed verdict, the truth of the evidence tending to support plaintiff's case is to be assumed, and such evidence must be regarded in the light most favorable to him.—*Moran et al. v. Ebey*, 517.

Same—Error.

10. It was error to direct a verdict for defendant in an action to recover the balance of an account, where plaintiff's evidence tended to show that the goods were ordered by, and delivered to, defendant, and that the latter made his original promise to pay for them.—*Moran et al. v. Ebey*, 517.

Real Property—Failure to Convey—Expenses Recoverable—Verdict—Sufficiency.

11. In the absence of an objection to it at the trial, the jury's verdict in a certain sum for "necessary expenses in preparing to take possession of the land," instead of for "expenses properly incurred,"—the words of the statute (sec. 6054, Revised Codes) and those used in the court's instructions,—was sufficient.—*Ross v. Saylor*, 559.

WAIVER.

See, also, Removal of Causes, 1.

New Trial—Conditional Order—Compliance—Waiver of Irregularities.

1. Plaintiff in a personal injury action had judgment for \$7,500. The court denied a motion for a new trial, provided plaintiff remit all damages in excess of \$4,000. This plaintiff did, but in his written acceptance of the condition imposed, stated that he did so "if the court had jurisdiction to make the order," he claiming that the court was without jurisdiction to make the order in that notice of intention to move for a new trial had not been given. He then appealed. *Held*, that, by filing his acceptance of the condition precedent to the denial of a new trial, plaintiff waived any irregularity in the proceedings on the new trial motion and could not appeal from the order.—*Harrington v. Butte, A. & Pac. Ry. Co.*, 22.

Appeal and Error—New Trial—Record.

2. Alleged errors in rulings of the court on the admission and exclusion of evidence and the allowance of amendments to the pleadings during trial, which were not called to its attention on the submission of the motion for new trial, based upon the minutes only, and in the absence of a bill of exceptions making them a part of the judgment-roll, will be conclusively presumed to have been waived.—*Foster et al. v. Winstanley et al.*, 314.

Criminal Law—Information—Defects—Motion in Arrest.

3. Defects in an information which, under section 9200, Revised Codes, must be taken advantage of by special demurrer, may not be urged in support of a motion in arrest of judgment; on such a motion all defects, except that of want of jurisdiction and the insufficiency of facts to state a public offense, are deemed waived.—*State v. Pemberton*, 530.

Briefs—Assignment of Error.

4. Assignments of error made in the brief, but not argued, will be deemed waived.—*Owens v. Davenport*, 555.

WASTE.

See Mortgages, 2.

WATERS AND WATER RIGHTS.

Pollution of streams,—see Municipal Corporations, 22-25.

Ditches Across Public Lands—Vested Rights—Subsequent Homestead Entry—Effect.

1. Where the construction of plaintiff's ditch over unoccupied public land was completed, and its predecessors in interest were in possession of it at the time defendant made a homestead filing on such land, the latter took the homestead subject to the right of way for the former's ditch (U. S. Comp. Stats., 1901, secs. 2339, 2340), even though water had not been appropriated or actually conveyed through it until after defendant's filing.—Cottonwood Ditch Co. v. Thom, 115.

Same—Quieting Title—Decree—Injunctive Relief—When Proper.

2. Where, in an action to quiet title to the right of way for an irrigation ditch, the court found that the ditch and right of way therefor were the property of plaintiff and that defendant had wrongfully interfered therewith, it did not err in incorporating in its decree an order restraining defendant from further interference. Plaintiff was entitled to complete relief.—Cottonwood Ditch Co. v. Thom, 115.

Same—Pleadings—Answer—Motion to Strike.

3. Nor did the court err in striking from defendant's answer an allegation that defendant had received nothing on account of the construction of the ditch over his land, and that, if maintained, he would be damaged in a certain sum. Plaintiff's ditch having been completed before any rights of defendant to the land traversed by it had accrued, he suffered no injury because of plaintiff's continued use of the ditch, and no rights of defendant were violated.—Cottonwood Ditch Co. v. Thom, 115.

Same—Forfeiture—Noncompliance with Statutes.

4. The right of way granted to plaintiff's predecessors in interest, referred to in paragraph 1 above, was not forfeited by failure of the grantees to comply with the United States statutes relative to filing maps, certificates, etc. (On Rehearing).—Cottonwood Ditch Co. v. Thom, 122.

Ditches Appurtenant to Placer Claims—When Exempt from Taxation.

5. Held, that a ditch, appurtenant to placer claims, which had always been used to convey water for mining such claims, and for no other purpose, and which, independently of such use, had never been the source of revenue to its owner, although the water could be sold for irrigation and other purposes and would be valuable in this connection, had no value independent of its use in connection with the placer lands so as to render it subject to taxation under section 2500, Revised Codes.—Hale v. County of Jefferson et al., 137.

Adverse User—Burden of Proof.

6. The burden of proving an adverse user of water rests upon him who alleges it.—Smith et al. v. Duff et al., 374.

Same—What Constitutes.

7. In order that the use of water may be said to have ripened into a right by adverse user, such use must have been open, notorious, continuous, adverse and exclusive, under a claim of right, for the statutory period of ten years.—Smith et al. v. Duff et al., 374.

Same.

8. Proof of the mere use of water for the statutory period is not sufficient to show that it was adverse. To constitute an "adverse" user, the prior appropriator must have been deprived of the water when he had actual need of it, and the use must have been such that during the entire statutory period he could have maintained an action against the party claiming the prescriptive right.—Smith et al. v. Duff et al., 374.

Same—Evidence—Insufficiency.

9. Proof that claimants of water by adverse use took all that flowed in a creek at low-water season and thus deprived others thereof, did not meet the requirements of the rule declared in paragraph 8, *supra*, where it appeared that water sufficient to mature the crops of the parties against whom the prescriptive right was claimed, had always been available, and that they ceased irrigating their hay lands at about the time the adverse claimants asserted they deprived them of the water, and where the evidence failed to show that the prior appropriators did not have other crops which needed irrigation after that time.—*Smith et al. v. Duff et al.*, 374.

Appropriation—Validity—How Determined.

10. In determining the validity of an appropriation of water, the claimant's intent, judged by his acts, the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof, are important factors.—*Smith et al. v. Duff et al.*, 382.

Rights of Appropriators.

11. A subsequent appropriator in a stream is entitled to have the water flow in the same manner as when he located, and he may insist that one prior to him shall be confined to what he actually appropriated or what is necessary for the purposes for which he intended to use the water.—*Smith et al. v. Duff et al.*, 382.

Appropriation—Evidence—Insufficiency—Remand.

12. Where the evidence in a water right suit failed to disclose what maximum amount of land respondent's predecessor in interest had irrigated, how much water he used, or when he used it for irrigating purposes, what his intentions were when making his appropriation, or the character of his land, the capacity of his ditch, or how soon he carried out his intentions and to what extent, or what diligence he exercised in carrying them out, the supreme court will not enter a final judgment, but will remand the cause for further proceedings.—*Smith et al. v. Duff et al.*, 382.

Subsurface Supply—Part of Stream.

13. The subsurface supply of a stream, whether coming from tributary swamps or running in the sand and gravel constituting its bed, is as much a part of the stream as is the surface flow, and is governed by the same rules.—*Smith et al. v. Duff et al.*, 382.

Development of Water—Burden of Proof.

14. One who based his right to the exclusive use of water upon an alleged development of a supply had the burden of proving that in developing it he did not intercept water to which others were rightfully entitled.—*Smith et al. v. Duff et al.*, 382.

Same—Rule not Applicable, When.

15. The rule that one who develops a new supply of water is entitled to its exclusive use has no application to the mere removal of obstructions in, or the hastening of the flow of, a stream; nor does it apply to the draining of a swamp which has a natural outlet and feeds a stream, in the undiminished flow of which others have prior rights.—*Smith et al. v. Duff et al.*, 382.

Same—Evidence—Insufficiency.

16. Evidence held insufficient to warrant a finding of the court that respondents in a water right suit were entitled to the exclusive use of certain water because developed by them.—*Smith et al. v. Duff et al.*, 382.

WITNESSES.

See, also, Cross-examination.

Expert witnesses,—see Evidence, 17, 18, 20, 23, 40; Rules of Court, 2.

Evidence on Former Trial—Admissibility.

1. The testimony of a witness, given at a former trial in an action between the same parties and relating to the same subject matter, who was out of the jurisdiction at the time of the second trial, was competent.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

Administering of Oath—Presumptions.

2. Where it appeared that a witness in a justice's court, in an action subsequently appealed to the district court, had been examined and cross-examined at length, the presumption attaches that the justice regularly performed his official duties and administered the oath to the witness before permitting him to testify.—*Mette & Kanne Distilling Co. v. Lowrey et al.*, 124.

New Trial—Credibility—Question for Jury.

3. The question of the credibility of witnesses is primarily addressed to the jury, and their verdict, in an action at law, sought to be avoided on the ground that the evidence was insufficient to justify it, should only be set aside for the most cogent reasons.—*Sutton v. Lowry et al.*, 462.

WORDS AND PHRASES.

"Account"—(Revised Codes, sec. 7007)

Moran et al. v. Ebey, 519.

"All Bills and Papers"—(Revised Codes, sec. 76)

State ex rel. Gregg et al. v. Erickson et al., 289.

"And Until Their Successors are Elected and Qualified"—(Constitution, Art. VIII, sec. 12)

State ex rel. Jones v. Foster, 588.

"Bill of Particulars"—(Revised Codes, sec. 7016)

Moran et al. v. Ebey, 519.

"Bona Fide Purchaser"—

Foster et al. v. Winstanley, 326.

"Bridge"—

Jenkins v. Newman et al., 80.

"Connected with the Subject of the Action"—(Revised Codes, sec. 6540)

Kaufman v. Cooper et al., 156.

"Corpus Delicti"—

State v. Keeland et al., 513.

"Establish"—

State v. Powers, 268.

"Highway"—

City of Butte v. Mikosowitz, 357.

"Incumbent"—

State ex rel. Jones v. Foster, 592.

"Indirectly"—

Shober v. Dean, 258.

"Agency"—

Shober v. Dean, 528.

"Injury to the Person"—(Code of Civil Procedure of 1895, sec. 3476)

McKenzie v. Doran et al., 596.

"Open and Notorious"—

Smith et al. v. Duff et al., 378.

"Postal Clerk"—

Hoskins v. Northern Pac. Ry. Co., 400.

"Robbery"—

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